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ONTARIO
LABOUR RELATIONS BOARD
REPORTS

Annual
Consolidated Index 2010

Ontario

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SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA..(Nov./Dec.) 839

Abandonment – Certification – Construction Industry – Standing – Status – Timeliness – In its response to a certification application, the employer asserted that it was bound to a collective agreement with an employee association and therefore the application was untimely – The union challenged the status of the association, and argued that the employer had no standing to proffer arguments on behalf of the association which, the union alleged, had abandoned its bargaining rights by failing to file a response or intervention – The Board found that the employer, as signatory to the agreement, could make arguments asserting the existence of the association and the validity of the collective agreement – The employer was not purporting to advance interests of individual employees – Matter continues

ECONOMY PAVING COMPANY (ST. CATHARINES) LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(May/June) 390

Accreditation – Construction Industry – Employer – Practice and Procedure – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was

insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed

THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089 .... (Nov./Dec.) 994

Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Practice and Procedure – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD .... (Jan./Feb.) 92

Alteration of Jurisdiction – Construction Industry – Intervenor – Practice and Procedure – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out

its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA .... (Nov./Dec.) 751

Apprehension of Bias – Construction Industry – Practice and Procedure – The applicant alleged an apprehension of bias in that the Vice-Chair deciding the matter (a dispute that the International violated sections 147 and/or 149) had been retained, in his personal capacity as an arbitrator, by the International (and not the Local) to determine the Carpenters ICI Collective Agreement for 2010-2013 – The Board noted that the parties to the Provincial Collective Agreement (the Carpenters' Employer Bargaining Agency and the Carpenters' District Council of Ontario [CDC]) were different from the parties before the Board (the International and Local 1256) – The Board noted that the degree of institutional impartiality and independence of the Board is well known and not challenged by the applicant – The Board found that while it may envision a situation in which the conduct of an individual may bring such impartiality and independence into question, it was not the case where a person acting as an independent adjudicator in a role that involved related but different parties and that required neutrality and credibility somehow compromises his or her independence and neutrality as a Vice-Chair – The Board concludes that an apprehension of bias was not made out – Matter continues

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 .... (Sept./Oct.) 719

Bar – Bargaining Rights – Termination – The Board issued reasons for its earlier "bottom line" determination that the applicant ought to be barred from pursuing a second termination application just two months after a first such application was dismissed when the union won the representation vote – The Board held that the exercise of its discretion under s. 111(2)(k) involves a careful weighing of competing interests and objectives – The employees had been given the opportunity to determine by secret ballot whether they wanted the union to continue to represent them, and a majority of them voted in favour of continued representation – Once a vote has been taken and counted, there must be a compelling reason to subject the stability of the collective bargaining relationship to the uncertainty of another test of the union's representation rights – No unusual circumstances were present here – The union should not be distracted from its obligations to bargain by having to defend a second attack on its bargaining rights – Application dismissed

ONTARIO LOTTERY AND GAMING CORPORATION c.o.b. as OLG BRANTFORD CASINO; RE JASON BONNEY; RE SEIU LOCAL 2, BREWERY, GENERAL AND PROFESSIONAL WORKERS' UNION .... (Mar./Apr.) 292

Bargaining Rights – Abandonment – Construction Industry – Delay – Related Employer – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA...(Nov./Dec.) 839

Bargaining Rights – Bar – Termination – The Board issued reasons for its earlier "bottom line" determination that the applicant ought to be barred from pursuing a second termination application just two months after a first such application was dismissed when the union won the representation vote – The Board held that the exercise of its discretion under s. 111(2)(k) involves a careful weighing of competing interests and objectives – The employees had been given the opportunity to determine by secret ballot whether they wanted the union to continue to represent them, and a majority of them voted in favour of continued representation – Once a vote has been taken and counted, there must be a compelling reason to subject the stability of the collective bargaining relationship to the uncertainty of another test of the union's representation rights – No unusual circumstances were present here – The union should not be distracted from its obligations to bargain by having to defend a second attack on its bargaining rights – Application dismissed

ONTARIO LOTTERY AND GAMING CORPORATION c.o.b. as OLG BRANTFORD CASINO; RE JASON BONNEY; RE SEIU LOCAL 2, BREWERY, GENERAL AND PROFESSIONAL WORKERS' UNION..(Mar./Apr.) 292

Bargaining Rights – Certification – Construction Industry – Practice and Procedure – Reconsideration – BACU (and BACU & Local 31) applied for certification in respect of bargaining units they already represented – The Board, on its own motion, directed submissions on whether an application made by a trade union that already holds bargaining rights for all of the employees in the bargaining unit for which it seeks certification as bargaining agent is an application for certification within the meaning of section 7 of the Act – The Board found that, other than closing the open period, there was no purpose served by such an application – Given that the trade union would simply acquire exactly what it already has, the Act did not contemplate a trade union displacing itself – The Board further found that an interpretation of s. 7 that allowed a trade union to displace itself would be inconsistent with other provisions of the Act and could lead to absurd results – Finally, the Board found that the purposes of the Act would be undermined if a trade union could apply to be recertified – Applications dismissed

BERNEL MASONRY INC. ET AL; RE BACU ....(Jul./Aug.) 450

Bargaining Rights – Certification – Construction Industry – The Painters applied to certify employees of the respondent pursuant to s.128.1 of the Act – The Respondent and Intervenor sought to have the application dismissed because on the application filing date the Painters still held bargaining rights for the unit of employees – The unit was the subject of a termination application filed during the open period – The ballots in the termination were counted on the date of filing of the application for certification, and the Painters lost the vote – By decision one week later, the Painters' bargaining rights were terminated – The next day, the Board dealt with the instant application for certification, finding that it was appropriate to exercise its discretion pursuant to s. 111(3)(b) of the Act and finding that the application for certification was timely – Certificates were issued – LIUNA subsequently sought reconsideration and intervenor status in the matter – The Board found that LIUNA had the right to intervene, reconsidered its decision and revoked the certificates – The issue before the Board was whether the Painters' application should be dismissed because they still held bargaining rights on the date of application for certification – The Board found that the Painters filed a valid application for certification in the context of knowing that they were shortly to have their bargaining rights terminated, and that the application was properly treated under s. 111(3)(b) of the Act – Matter continues

BIGGS & NARCISO CONSTRUCTION SERVICES INC; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; RE LIUNA, LOCAL 1059, TIM SCOTT ....(Nov./Dec.) 727

Bargaining Rights – Construction Industry – Practice and Procedure – Termination – Trade Union – The Board confirmed that applicants seeking to terminate bargaining rights in the ICI sector may deliver their applications to either the employee bargaining agency or the local union with whom they have a relationship – The Board decided that the trade union named as the respondent has the obligation to give notice of the termination application to the Employee Bargaining Agency and the affiliated bargaining agents – Matter continues

KIDD MECHANICAL INC.; RE EMPLOYEES OF KIDD MECHANICAL INC. REPRESENTED BY VIKKI SCHLONIES; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ON ITS OWN BEHALF AND ON BEHALF OF ALL OF ITS AFFILIATED BARGAINING AGENTS..(Mar./Apr.) 282

Bargaining Rights – *Crown Employees Collective Bargaining Act* – Sale of a Business – This application under s. 10 of the *Crown Employees Collective Bargaining Act* (CECBA) and s. 69 of the *Labour Relations Act* (LRA) relates to the Crown's decision to cancel contracts between the Crown and York Detention Centre Ltd. (YDC) resulting in the lay off of members of OPSEU – The issues were (1) whether the termination of the Crown's contract with YDC and the transfer of young offenders to the Roy McMurtry Youth Centre (RMYC) amounted to a transfer of an undertaking for the purposes of CECBA such that s. 69 of the LRA applied to bind the Crown to the YDC Collective Agreement and (2) whether such a transfer would grant YDC employees collective agreement rights at RMYC in Brampton notwithstanding that the geographic scope of the collective agreement is limited to Toronto – The Board found that the right to house young offenders, the obligation to provide them services and the funding necessary to do so as derived from the contract was transferred from YDC back to the Crown at RMYC – These were the essential elements of YDC's undertaking, without which it could not operate its business – Accordingly, the Board found that there had been a transfer of an undertaking within the meaning of CECBA from YDC to the Crown at RMYC such that s. 69 of the LRA applied, binding the Crown to the YDC Collective Agreement – On the second issue, the Board followed the principle found in *Silverwood Dairies* that successor rights provisions do not operate to extend bargaining rights beyond the geographic scope of the collective agreement binding the predecessor – Accordingly, the Board denied OPSEU's request for orders requiring the Crown to recognize the collective agreement rights of YDC employees at RMYC

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CHILDREN AND YOUTH SERVICES, YORK DETENTION CENTRE LTD. AND NORTHERN YOUTH SERVICES INC.; RE OPSEU ....(Jul./Aug.) 471

Bargaining Rights – Employee – Status – Termination – IBEW Local 115 held bargaining rights in the ICI sector and in all other sectors in Board Area 12 – In a previous decision, the Board held that the termination application was untimely with respect to the ICI sector, but was timely as it related to all other sectors – On the date of application, the individual applicant performed ICI work for the majority of the day and non-ICI work for a minority of the day – The issue before the Board was whether an employee must spend a majority of his/her work day performing bargaining unit work in order to be an "employee in a bargaining unit" for the purposes of a termination application – The Board found that applying the "majority of time test to sectors" used in certification applications did not make labour relations sense in the context of termination applications – There was no compelling justification to disqualify an individual as an employee of the bargaining unit in circumstances where that individual, on the date of application, performed work within the geographic area of the bargaining unit, within the scope of the bargaining unit and of the type covered by the collective agreement or certificate in the relevant sector, albeit not for the majority of the workday – The Board found that the applicant was an employee in the bargaining unit on the date of application – The Board found that the majority of time principle, as it relates to sectors, was not applicable to termination applications in the construction industry – Ballot to be counted

TERRY SHORTT ELECTRICAL SERVICES LTD.; RE GLYNN SAYEAU; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO QUINTE & ST. LAWRENCE ELECTRICAL WORKERS LOCAL UNION 115..................... (Mar./Apr.) 342

Bargaining Rights – Trade Union – Union Successor Rights – Unfair Labour Practice – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION ......(Nov./Dec.) 871

Bargaining Unit – Certification – Construction Industry – Local 183 applied for certification under the construction industry provisions of the Act asserting that the locating work performed in an excavation project was construction industry work – Local 183 argued that the work was performed on a construction site and that it was necessary and integral to the work on those sites – The company argued that the purpose of the work was safety, not construction; that its contract was not with the constructor; and that the work was performed before construction began, which therefore could not be a part of the construction industry – The Board found that the work in question was "necessary and integral" to the construction activity as there was a clear connection between the work required to be performed by the locators and the work of the excavation that requires the locating work be undertaken – Therefore, it was construction industry work – Matter continues

TELECOM CANADA LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Mar./Apr.) 334

Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Status – The employer and the union did not agree on the list of employees who were at work on the date of application and performing work within the scope of the bargaining unit – The employer challenged the sufficiency of the union's submissions as they failed to contain detailed facts and failed to establish a *prima facie* case as per the Board's Information Bulletin No. 9 – The Board confirmed that where a party states that a name belongs on the employee list, the submissions filed will generally be required to contain sufficient facts to establish that the person was at work and performing bargaining unit work for a majority of the day on the date of application – The Board found that the union's submissions were deficient as they did not describe the work being performed on the date of application notwithstanding that such information appeared to be available to the union – The Board directed the union to file any further submissions upon which it wished to rely – Matter continues

CONTERRA RESTORATION LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183 ....(May/June) 379

Bargaining unit – Certification – Employee – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

RAINBOW CONCRETE INSDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 218

Bargaining Unit – Certification – Reconsideration – Following resolution of status disputes, the Board determined that the applicant had between 40 and 55% support for its application, and ordered a vote – On the date the vote decision was sent to the parties (but before they received it), the applicant provided the Board with an accurate membership list, persuading the Board that the applicant had greater than 55% support for its unit – The Board revoked the earlier decision and issued a fresh decision certifying the applicant – The employer sought reconsideration of the latter decision, arguing that the Board had no authority to consider submissions made by the applicant after the hearing had ended – The Board found there is nothing in its Rules that addresses whether a party may file written submissions after a hearing has concluded – Information relating to membership evidence was properly not provided to the employer by the applicant; however, in response to the request for reconsideration, the applicant had provided the employer with its post-hearing list, so the employer was not prejudiced –The information provided by the applicant dealt only with the identity of certain individuals (e.g., clarification of spelling), and not with their status (which was the subject of the hearing before the Board) – The Board found it had made an error in assessing the membership evidence and ordering the vote and therefore appropriately reconsidered its decision – Employer's request for reconsideration denied

QUALITY RUGS OF CANADA LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 ....(Jul./Aug.) 524

Bargaining Unit – Certification – Status – This application raised two issues: whether the Union's proposed bargaining unit improperly excluded five yard dispatchers; and whether S and B were employees at the time of the vote – The Board noted that the Union's proposed bargaining unit need not be the best possible, but its configuration should be viable without causing serious labour relations problems – There were several considerations: the dispatchers would be the only full-time employees in the distribution centre not represented; they had little prospect of attracting a trade union; there would be fewer work opportunities for bargaining unit members because many of the dispatchers were sourced from bargaining unit positions; it was a condition of employment that bargaining unit employees cover the dispatcher positions; and a dispatcher position was a logical placement for employees with physical restrictions and/or who were in need of accommodation due to disability – The Board held that the Union's proposed exclusion of the yard dispatchers created undue fragmentation – As for the two remaining disputed employees, the Board determined that S, on maternity leave of finite duration with a statutorily protected right to return to her position, was an employee at the time of the vote, but B, away from the workplace, earning no wages, for almost twenty months, was not – B's continued group benefit coverage and employee discount were not evidence of a substantial connection to the workplace – Ballots to be counted in accordance with Board decision

HUDSON'S BAY COMPANY; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA)..........................(Jan./Feb.) 63

Certification – Abandonment – Construction Industry – Standing – Status – Timeliness – In its response to a certification application, the employer asserted that it was bound to a collective agreement with an employee association and therefore the application was untimely – The union challenged the status of the association, and argued that the employer had no standing to proffer arguments on behalf of the association which, the union alleged, had abandoned its bargaining rights by failing to file a response or intervention – The Board found that the employer, as signatory to the agreement, could make arguments asserting the existence of the association and the validity of the collective agreement – The employer was not purporting to advance interests of individual employees – Matter continues

ECONOMY PAVING COMPANY (ST. CATHARINES) LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL...(May/June) 390

Certification – Bargaining Rights – Construction Industry – Practice and Procedure – Reconsideration – BACU (and BACU & Local 31) applied for certification in respect of bargaining units they already represented – The Board, on its own motion, directed submissions on whether an application made by a trade union that already holds bargaining rights for all of the employees in the bargaining unit for which it seeks certification as bargaining agent is an application for certification within the meaning of section 7 of the Act – The Board found that, other than closing the open period, there was no purpose served by such an application – Given that the trade union would simply acquire exactly what it already has, the Act did not contemplate a trade union displacing itself – The Board further found that an interpretation of s. 7 that allowed a trade union to displace itself would be inconsistent with other provisions of the Act and could lead to absurd results – Finally, the Board found that the purposes of the Act would be undermined if a trade union could apply to be recertified – Applications dismissed

BERNEL MASONRY INC. ET AL; RE BACU..(Jul./Aug.) 450

Certification – Bargaining Rights – Construction Industry – The Painters applied to certify employees of the respondent pursuant to s.128.1 of the Act – The Respondent and Intervenor sought to have the application dismissed because on the application filing date the Painters still held bargaining rights for the unit of employees – The unit was the subject of a termination application filed during the open period – The ballots in the termination were counted on the date of filing of the application for certification, and the Painters lost the vote – By decision one week later, the Painters' bargaining rights were terminated – The next day, the Board dealt with the instant application for certification, finding that it was appropriate to exercise its discretion pursuant to s. 111(3)(b) of the Act and finding that the application for certification was timely – Certificates were issued – LIUNA subsequently sought reconsideration and intervenor status in the matter – The Board found that LIUNA had the right to intervene, reconsidered its decision and revoked the certificates – The issue before the Board was whether the Painters' application should be dismissed because they still held bargaining rights on the date of application for certification – The Board found that the Painters filed a valid application for certification in the context of knowing that they were shortly to have their bargaining rights terminated, and that the application was properly treated under s. 111(3)(b) of the Act – Matter continues

BIGGS & NARCISO CONSTRUCTION SERVICES INC; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; RE LIUNA, LOCAL 1059, TIM SCOTT ....(Nov./Dec.) 727

Certification – Bargaining Unit – Construction Industry – Local 183 applied for certification under the construction industry provisions of the Act asserting that the locating work performed in an excavation project was construction industry work – Local 183 argued that the work was performed on a construction site and that it was necessary and integral to the work on those sites – The company argued that the purpose of the work was safety, not construction; that its contract was not with the constructor; and that the work was performed before construction began, which therefore could not be a part of the construction industry – The Board found that the work in question was "necessary and integral" to the construction activity as there was a clear connection between the work required to be performed by the locators and the work of the excavation that requires the locating work be undertaken – Therefore, it was construction industry work – Matter continues

TELECOM CANADA LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Mar./Apr.) 334

Certification – Bargaining unit – Employee – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

RAINBOW CONCRETE INSDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 218

Certification – Bargaining Unit – Reconsideration – Following resolution of status disputes, the Board determined that the applicant had between 40 and 55% support for its application, and ordered a vote – On the date the vote decision was sent to the parties (but before they received it), the applicant provided the Board with an accurate membership list, persuading the Board that the applicant had greater than 55% support for its unit – The Board revoked the earlier decision and issued a fresh decision certifying the applicant – The employer sought reconsideration of the latter decision, arguing that the Board had no authority to consider submissions made by the applicant after the hearing had ended – The Board found there is nothing in its Rules that addresses whether a party may file written submissions after a hearing has concluded – Information relating to membership evidence was properly not provided to the employer by the applicant; however, in response to the request for reconsideration, the applicant had provided the employer with its post-hearing list, so the employer was not prejudiced –The information provided by the applicant dealt only with the identity of certain individuals (e.g., clarification of spelling), and not with their status (which was the subject of the hearing before the Board) – The Board found it had made an error in assessing the membership evidence and ordering the vote and therefore appropriately reconsidered its decision – Employer's request for reconsideration denied

QUALITY RUGS OF CANADA LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 ....(Jul./Aug.) 524

Certification – Bargaining Unit – Status – This application raised two issues: whether the Union's proposed bargaining unit improperly excluded five yard dispatchers; and whether S and B were employees at the time of the vote – The Board noted that the Union's proposed bargaining unit need not be the best possible, but its configuration should be viable without causing serious labour relations problems – There were several considerations: the dispatchers would be the only full-time employees in the distribution centre not represented; they had little prospect of attracting a trade union; there would be fewer work opportunities for bargaining unit members because many of the dispatchers were sourced from bargaining unit positions; it was a condition of employment that bargaining unit employees cover the dispatcher positions; and a dispatcher position was a logical placement for employees with physical restrictions and/or who were in need of accommodation due to disability – The Board held that the Union's proposed exclusion of the yard dispatchers created undue fragmentation – As for the two remaining disputed employees, the Board determined that S, on maternity leave of finite duration with a statutorily protected right to return to her position, was an employee at the time of the vote, but B, away from the workplace, earning no wages, for almost twenty months, was not – B's continued group benefit coverage and employee discount were not evidence of a substantial connection to the workplace – Ballots to be counted in accordance with Board decision

HUDSON'S BAY COMPANY; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA)..........................(Jan./Feb.) 63

Certification – Construction Industry – Bargaining Unit – Practice and Procedure – Status – The employer and the union did not agree on the list of employees who were at work on the date of application and performing work within the scope of the bargaining unit – The employer challenged the sufficiency of the union's submissions as they failed to contain detailed facts and failed to establish a *prima facie* case as per the Board's Information Bulletin No. 9 – The Board confirmed that where a party states that a name belongs on the employee list, the submissions filed will generally be required to contain sufficient facts to establish that the person was at work and performing bargaining unit work for a majority of the day on the date of application – The Board found that the union's submissions were deficient as they did not describe the work being performed on the date of application notwithstanding that such information appeared to be available to the union – The Board directed the union to file any further submissions upon which it wished to rely – Matter continues

CONTERRA RESTORATION LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183 ....(May/June) 379

Certification – Construction Industry – Employer – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ....(Nov./Dec.) 760

Certification – Construction Industry – Practice and Procedure – Status – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51 ....(Nov./Dec.) 733

Certification – Construction Industry – Related Employer – LIUNA sought to certify the employees of Mirtren Contractors Limited and shortly thereafter filed an application for relief under the related employer provision of the Act, citing also Mirtren Construction Limited and Mirtren Builders Ltd. (claim against latter company dropped) – The employees of Mirtren Contractors were represented by CLAC – Contractors asserted it had no employees in the bargaining unit sought by LIUNA - The Board found that although both Contractors and Construction were owned by one individual, they carried on business in two distinct divisions, geographically apart, with each division reporting to different management for operational and labour relations purposes – The Board dismissed the application for a declaration that the companies were related but, given there was no prejudice to Construction, was satisfied that it should invoke s. 112 to find that the responding party had been incorrectly named in the application for certification – Matters continue

MIRTREN CONTRACTORS LIMITED AND MIRTREN CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Sept./Oct.) 644

Certification – Construction Industry – Timeliness – Because of a defective initial delivery (by fax) of one of two applications for certification, and the subsequent delivery of the application by courier, the employer asserted that the application was untimely – The Board (differently constituted) ruled on the delivery some three weeks after it was actually made – The present panel held that the employer was required to file its response and Schedule A within two days of the delivery of the application – The Board rejected the employer's position that the application for certification was not "valid" until the Board exercised its discretion to extend the time for delivery: once filed with the Board, the application was always valid – The employer's failure to provide a timely response prejudiced the applicant's ability to ascertain where employees were working on the application date – One certificate issued; second matter continues

JAY-DEE CONCRETE FORMING, VANSMIT LTD. O/A; RE LABOURERS' INTERNATONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 71

Certification – Construction Industry – Timeliness – Voluntary Recognition – Bruce Power and BACU were bound to a collective agreement that provided that if bricklayers' work was performed by Aecon or another subcontractor, the subcontractor was required to sign a document ("Appendix E") recognizing the bargaining rights of BACU – Aecon signed the document and delivered it to Bruce Power who failed to deliver it to BACU – BACU applied to certify bricklayers employed by Aecon – Aecon's position was that it was already bound to a collective agreement as a result of signing Appendix E, thus the application was untimely – The issue before the Board was whether a voluntary recognition had been created, and a collective agreement reached, between Aecon and BACU when Aecon executed the Appendix E document but BACU did not – The Board held that once Aecon executed Appendix E, the document became a voluntary recognition agreement between Aecon and BACU – The Board found that the signature of Aecon evidenced its acceptance of the terms of the voluntary recognition agreement offered by BACU – Accordingly the employees subject to the certification application were covered by a collective agreement on the application date – Application dismissed as untimely

AECON CONSTRUCTION GROUP INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA ....(May/June) 363

Certification – Discharge – Interim Relief – Unfair Labour Practice – The union applied for interim reinstatement of the worker contending he was terminated for his involvement in the organizing drive – The evidence showed that prior to his termination the union had signed up five members (in a 65 member bargaining unit) and after his termination the union signed up an additional 37 members and filed for certification – As the worker's termination did not stall the organizing drive (indeed it seemed to propel it), the Board found that interim relief was not necessary to prevent irreparable harm nor was it necessary to achieve other significant labour relations objectives – Accordingly all of the conditions under s. 98(2) were not met – Application dismissed

NOVOTEL CANADA INC., ACCOR CANADA INC., NOVOTEL OTTAWA; RE HOSPITALITY & SERVICE TRADE UNION, LOCAL 261 AND JEFFREY SEGAT .... (Mar./Apr.) 287

Certification – Displacement – Natural Justice – Practice and Procedure – Representation Vote – Trade Union – In a displacement application for certification, Workers United Ontario Council (WUOC), the losing trade union in a close vote, raised an issue concerning the conduct of the representation vote – The vote consisted of two one-hour polls, one in the morning, the other in the evening – During the first fifteen minutes of the evening poll, the building doors were locked barring access to potential voters – Inquiries made by WUOC did not indicate that any individual was prevented from voting due to lack of access – WUOC requested another vote which UNITE HERE opposed – The Board followed the principle that "when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election" – The Board found that voters are entitled to a high standard of integrity, but not perfection in the conduct of representation votes – The Board concluded that there was no evidence the error prevented anyone from voting, and declined to disregard the outcome of the balloting – Matter continues

NORDIC GAMING CORPORATION; RE WORKERS UNITED ONTARIO COUNCIL; RE UNITE HERE ....(Jul./Aug.) 495

Certification – Employer Support – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 ....(Nov./Dec.) 850

Certification – Interim Order – ETFO applied to represent a bargaining unit of designated early childhood educators – CUPE intervened in the application, asserting that it represented the DECEs in an all employee unit covered by a subsisting collective agreement – The status of the DECEs was the subject of an on-going grievance between CUPE and the school board in which the arbitrator had denied ETFO status to intervene – The issue for the Board was whether it should determine if the employees affected by the application for certification are covered by a collective agreement, or if an arbitrator should make that decision – ETFO asked for an interim order that would have the Board ask CUPE and the school board to adjourn their grievance pending the outcome of the application for certification – The Board held that its jurisdiction to determine the issue was parallel to the arbitrator's, with neither being superior to the other; the Board is not bound by any arbitration award – A proceeding before the Board best protects the natural justice rights of all the parties, including the employees, so the Board chose not to defer to arbitration – Interim ordered dismissed; matter continues

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE ....(Nov./Dec.) 743

Certification – Membership Evidence – Practice and Procedure – The union filed membership evidence that was undated – The Board found that undated membership cards is not evidence that the Board can rely on in deciding whether to order a representation vote – The Board noted that Rule 9.2 requires that membership evidence must disclose the date upon which each signature was obtained – Further the Board found it was unlikely that it could rely upon affidavit evidence to provide the dates the cards were signed, given s. 8(3) prevents the Board from considering the affidavit and it would defeat the quick vote scheme of the Act – Finally, given the large number of undated cards this would not be an appropriate case, in any event, to relieve against the Board's rules – Application dismissed

STOCK TRANSPORTATION LTD.; RE AMALGAMATED TRANSIT UNION LOCAL 1573 ....(May/June) 442

Certification – Natural Justice – Related Employer/Sale of Business – Practice and Procedure – Reconsideration – Termination – Subsequent to the filing of a 69/1(4) application the UFCW and responding employers settled the matter in a way that affected employees in locations other than those which had received notice of the original applications – Neither the parties nor the Board ensured that these additional employees received notice of the Board's decision, reflecting the parties' settlement, which affected their rights – Given a timely objection by employees from one of the stores for which notice was not provided, the Board varied its decision to exclude the store from the bargaining unit descriptions contained in its earlier decision – Termination application dismissed – Certification continues

PHARMA PLUS DRUGMARTS LTD., KATZ GROUP CANADA LTD. AND PHARMX REXALL STORES LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 414 ....(May/June) 436

Certification – Practice And Procedure – Representation Vote – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered

ROYAL VICTORIA HOSPITAL; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA ....(Nov./Dec.)

Certification – Practice and Procedure – When the description of the bargaining unit and the status of four individuals remained following the Regional Certification Meeting, the Board scheduled a hearing in Toronto – The employer requested that the venue of the hearing be changed to Windsor because it could not afford the cost of travelling to Toronto or bringing its three witnesses to the hearing – The Board pointed to its travel policy which outlines the limited funding and human resources available for travel outside of Toronto – In matters such as applications for certification, the policy requires the first two days of the hearing to take place in Toronto – The Board did note it has discretion to depart from this policy in exceptional circumstances (for example the health of a party or witness), but found no sufficiently compelling reasons to depart from the policy in this matter – Matter proceeds

MICHAEL ANTHONY ALLSOP O/A ADVANCED SOLAR SOLUTIONS; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS CONSTRUCTION COUNCIL OF ONTARIO ....(Jul./Aug.) 493

Certification – Reconsideration – Timeliness – The Board certified the trade union based on sufficient card-based membership, and stated in its decision that it had no regard to the employer's late-filed response – In its request for reconsideration, the employer deposed by affidavit that it had received misleading information regarding the time limit for its response from a Board clerk – The Board sets out the policy underlying its reluctance to permit parties to rely on oral evidence from Board staff to justify non-compliance with requirements established by the Act and the Rules (see *Sarnia Construction*) – In this case, the affidavit sworn by the employer's representative indicated he advised the Board clerk he had only received the applicant's information that day, which was the day relied upon by the Board staff – However, correspondence from the employer's counsel clearly showed that the responding party had received the application a day earlier and knew the date from which it was required to calculate the time for filing the response – Request for reconsideration dismissed

BUILD-ALL CONTRACTORS; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL ....(Jul./Aug.) 445

Certification – Reconsideration – Timeliness –In its response to the application for certification the employer indicated its disagreement with both the description of the bargaining unit and the union's estimate of individuals in it; and also checked "no" in response to the question whether it was giving an 8.1 notice – One day after the two day statutory time limit expired, the employer wrote the Board saying the "no" was inadvertent and it had provided the necessary information under 8.1 – The Board found the notice untimely; one week after the vote was taken and counted the employer applied for reconsideration – The Board rejected the employer's first argument that it had complied with the Act and given notice – The Board found the "no" coupled with the employer's failure to answer the supplementary question in addition to the statutory requirement indicated to it that notice was not given – The Board also rejected the alternative argument that it should exercise its discretion to extend the notice, when it found, assuming it had such discretion, that it would only grant relief in the most compelling circumstances, and there were none in these circumstances – Request for reconsideration denied

THE CORPORATION OF THE TOWN OF TECUMSEH; RE CUPE .... (Sept./Oct.) 713

Certification – Related Employer – The Labourers sought certification for two employees engaged to carry out the "pump watch" at the Ear Falls Project during a specified short period of time – The application for certification and the relief sought under s. 1(4) of the *LRA* were dependent on a finding that one or more of SNC Lavalin Inc., SNC-Lavalin Group Inc. and SNC-Lavalin Power Ontario Inc. (collectively "SNC") was the employer of the two labourers – The Board found that when the original subcontracting arrangements made by SNC collapsed, efforts were made to ensure that there was continuity for the pump watch responsibilities – SNC was sensitive, however, to the employer issue long before the arrangements for the pump watchers were made; it took steps to ensure that it was not, and was not seen to be, the employer of the labourers – The Board held that there was no doubt that the work performed was for the benefit of SNC and that SNC was ultimately responsible for the labourers being paid through its contract with a subcontractor – However, fundamental control over the labourers at the relevant time was exercised by a contracted project manager, and not SNC – Applications dismissed

SNC LAVALIN INC.; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. (Sept./Oct.) 697

Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL...(Jan./Feb.) 1

Certification Where Act Contravened – Construction Industry – Interference with Trade Unions – Remedies – Unfair Labour Practice – The Carpenters commenced an organizing campaign by having an employee of Southend distribute cards – The owner's brother, who was the employee's supervisor, openly expressed his dislike of unions, and burned another employee's union card at the workplace, in front of several other employees – The employer argued that the discharge of the employee who began distributing cards was for excessive absences, and for drinking during lunch – The Board found that the termination of the employee effectively put an end to the organizing campaign – The Board preferred the discharged employee's evidence over that of the employer's witnesses – Although his attendance may have been at issue, it was not the reason for the discharge – Other employees were reprimanded for drinking at lunch; the inside organizer was terminated – The employer did nothing to distance himself from his brother's anti-union behaviour – The Board was satisfied that a representation vote would not reflect the true wishes of employees – Certificate granted

SOUTHEND DRYWALL & ACOUSTICS LTD.; RE UBCJA, LOCAL 2486...(Mar./Apr.) 317

Certification Where Act Contravened – Discharge for Union Activity – Unfair Labour Practice – During the course of CEP's organizing campaign, Boehmer and some of its employees distributed written communications which the union alleged were false and misleading and which implied that unionization would undermine the viability of the enterprise and would therefore compromise employees' job security – CEP lost the representation vote by a large margin, despite obtaining the support of a majority of the employees as of the application date – The Union alleged that literature distributed by, or with the approval of, Boehmer threatened the livelihood of employees and had a chilling effect on the voters – The issue before the Board was whether Boehmer violated the Act and if so, whether CEP was entitled to remedial certification despite having lost the representation vote – A majority of the Board found that a number of events at the workplace did not constitute unfair labour practices; however, the written communications and the links made in those communications between unionization and job security did constitute a violation of the Act – The majority found that neither a second representation vote alone nor the Board's other customary remedies in combination with a second vote would adequately respond to the threats raised by Boehmer's written communications – The union was entitled to remedial certification – Certificate issued

BOEHMER BOX LP; RE CEP...(Mar./Apr.) 237

Collective Agreement – Conciliation – Reference – The Minister sought advice on whether he could appoint a conciliation officer pursuant to s. 18(2) – The evidence established that prior to the termination of the collective agreement (which had an automatic renewal clause) the union representative left voicemail messages advising that they wished to set dates for bargaining and that their only demand was to increase wage rates to a specific amount; and that the employer representative called the union representative back and spoke with him, at which time he reiterated the demand for wage rate increase – As neither party had given written notice to bargain, the critical question was whether the parties had "met and bargained" – The Board, following *Danver Ambulance*, found that the words "met and bargained" did not necessarily mean a face-to-face meeting provided that a person authorized to bargain for one party makes a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party – The Board also noted that given the advancement in technology since *Danver* was written, its reasoning is that much more persuasive today – The Board found that the conditions for the application of s. 18(2) were present – Advice given

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18..(Nov./Dec.) 739

Collective Agreement – Construction Industry – Grievance – This referral by Otis of a grievance centred around two elevator mechanics from IUEC Local 102, which is based out of Winnipeg, performing work in Terrace Bay, Ontario – The issue was what wage rate the Local 102 members were entitled to: their local wage rate, or the higher Toronto wage rate – A survey of the evolution of the collective agreement and associated letters of understanding revealed that any members working in areas other than their local area, at the request of their employer, would receive their local wage rate or the wage rate of the area they were working in, whichever was higher – Local 102 acknowledged that the collective agreement language on its face restricted the application of the Toronto wage rate to the City of Thunder Bay – The union submitted that the language of the collective agreement did not reflect the negotiation of the parties that the wage rate set for the City of Thunder Bay also would include the surrounding Northern areas – Local 102 asked the Board to rectify the collective agreement to reflect an error in the language used – The Board reviewed the criteria for rectification and determined there was no clear and easily fixable error in the collective agreement, as the parties significantly disagreed on what had been agreed to in negotiations – Consequently, the test for granting rectification laid out in *Nav Canada* was not met – The Board concluded there was no wage rate established for Terrace Bay and the Local 102 members were therefore entitled to their home wage rate – Grievance allowed

OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 102..(Jul./Aug.) 499

Collective Agreement – Duty to Bargain in Good Faith – OPSEU complained that MPAC's revocation of an offer for the renewal of a collective agreement and subsequent tabling of a new offer following the release of the provincial budget was a violation of the employer's duty to bargain in good faith – The Board recognized that its jurisprudence reflects an inherent conflict: on the one hand, there is an element of voluntarism in the concept of bargaining which means that the parties are each expected to maximize their own self interest and are not required to agree to any particular collective agreement; on the other hand, there is an element of compulsion introduced by the obligation to bargain in good faith and the obligation to make every reasonable effort to make a collective agreement – Further, negotiation is a fluid process and may encounter changes in circumstances that require a shift or even reversal in bargaining position – The Board held that the introduction of the budget and applicable FAQs were relevant considerations for the employer's position, and accepted that "the spirit and intent" of these documents gave the employer *bona fide* reasons to change its position – Application dismissed

MUNICIPAL PROPERTY ASSESSMENT CORPORATION; RE OPSEU.....(May/June) 425

Conciliation – Collective Agreement – Reference – The Minister sought advice on whether he could appoint a conciliation officer pursuant to s. 18(2) – The evidence established that prior to the termination of the collective agreement (which had an automatic renewal clause) the union representative left voicemail messages advising that they wished to set dates for bargaining and that their only demand was to increase wage rates to a specific amount; and that the employer representative called the union representative back and spoke with him, at which time he reiterated the demand for wage rate increase – As neither party had given written notice to bargain, the critical question was whether the parties had "met and bargained" – The Board, following *Danver Ambulance*, found that the words "met and bargained" did not necessarily mean a face-to-face meeting provided that a person authorized to bargain for one party makes a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party – The Board also noted that given the advancement in technology since *Danver* was written, its reasoning is that much more persuasive today – The Board found that the conditions for the application of s. 18(2) were present – Advice given

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 .... (Nov./Dec.) 739

Conflict of Interest – Duty of Fair Representation – The applicant claimed that the trade union had breached its duty of fair representation when it refused to pursue her termination grievance to arbitration – Previous to the applicant's discharge, the Local had filed suit against the applicant for defamation in an unrelated incident – The applicant was granted representation by the National union and a favourable legal opinion was prepared – The Local union representative intervened and fresh evidence was acquired which was not shared with the author of the previous legal opinion; instead it was given to a new author and an unfavourable opinion was produced – All parties were able to address the membership at the grievance arbitration vote but no mention was made by the local rep of the contradictory legal opinion; a vote of the membership was held and it was decided that arbitration was not appropriate given the circumstances – The Board held that there was a conflict of interest between the applicant and the Local union due to the pending law suit and that the Local union had breached their duty of fair representation when there was no mention by the Local union of the legal opinion favourable to the applicant nor were any actions taken to distinguish the two opinions at the membership vote – Application allowed; Board ordered the grievance to arbitration

SHERYL ANNE TOOP; RE CANADIAN UNION OF PUBLIC EMPLOYEES AND CUPE LOCAL 1974 .... (Nov./Dec.) 818

Construction Industry – Abandonment – Bargaining Rights – Delay – Related Employer – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA..(Nov./Dec.) 839

Construction Industry – Abandonment – Certification – Standing – Status – Timeliness – In its response to a certification application, the employer asserted that it was bound to a collective agreement with an employee association and therefore the application was untimely – The union challenged the status of the association, and argued that the employer had no standing to proffer arguments on behalf of the association which, the union alleged, had abandoned its bargaining rights by failing to file a response or intervention – The Board found that the employer, as signatory to the agreement, could make arguments asserting the existence of the association and the validity of the collective agreement – The employer was not purporting to advance interests of individual employees – Matter continues

ECONOMY PAVING COMPANY (ST. CATHARINES) LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(May/June) 390

Construction Industry – Accreditation – Employer – Practice and Procedure – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed

THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089..(Nov./Dec.) 994

Construction Industry – Alteration of Jurisdiction – Interference with Trade Union – Practice and Procedure – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD ....(Jan./Feb.) 92

Construction Industry – Alteration of Jurisdiction – Intervenor – Practice and Procedure – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA ....(Nov./Dec.) 751

Construction Industry – Apprehension of Bias – Practice and Procedure – The applicant alleged an apprehension of bias in that the Vice-Chair deciding the matter (a dispute that the International violated sections 147 and/or 149) had been retained, in his personal capacity as an arbitrator, by the International (and not the Local) to determine the Carpenters ICI Collective Agreement for 2010-2013 – The Board noted that the parties to the Provincial Collective Agreement (the Carpenters' Employer Bargaining Agency and the Carpenters' District Council of Ontario [CDC]) were different from the parties before the Board (the International and Local 1256) – The Board noted that the degree of institutional impartiality and independence of the Board is well known and not challenged by the applicant – The Board found that while it may envision a situation in which the conduct of an individual may bring such impartiality and independence into question, it was not the case where a person acting as an independent adjudicator in a role that involved related but different parties and that required neutrality and credibility somehow compromises his or her independence and neutrality as a Vice-Chair – The Board concludes that an apprehension of bias was not made out – Matter continues

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 .... (Sept./Oct.) 719

Construction Industry – Bargaining Rights – Certification – Practice and Procedure – Reconsideration – BACU (and BACU & Local 31) applied for certification in respect of bargaining units they already represented – The Board, on its own motion, directed submissions on whether an application made by a trade union that already holds bargaining rights for all of the employees in the bargaining unit for which it seeks certification as bargaining agent is an application for certification within the meaning of section 7 of the Act – The Board found that, other than closing the open period, there was no purpose served by such an application – Given that the trade union would simply acquire exactly what it already has, the Act did not contemplate a trade union displacing itself – The Board further found that an interpretation of s. 7 that allowed a trade union to displace itself would be inconsistent with other provisions of the Act and could lead to absurd results – Finally, the Board found that the purposes of the Act would be undermined if a trade union could apply to be recertified – Applications dismissed

BERNEL MASONRY INC. ET AL; RE BACU ....(Jul./Aug.) 450

Construction Industry – Bargaining Rights – Certification – The Painters applied to certify employees of the respondent pursuant to s.128.1 of the Act – The Respondent and Intervenor sought to have the application dismissed because on the application filing date the Painters still held bargaining rights for the unit of employees – The unit was the subject of a termination application filed during the open period – The ballots in the termination were counted on the date of filing of the application for certification, and the Painters lost the vote – By decision one week later, the Painters' bargaining rights were terminated – The next day, the Board dealt with the instant application for certification, finding that it was appropriate to exercise its discretion pursuant to s. 111(3)(b) of the Act and finding that the application for certification was timely – Certificates were issued – LIUNA subsequently sought reconsideration and intervenor status in the matter – The Board found that LIUNA had the right to intervene, reconsidered its decision and revoked the certificates – The issue before the Board was whether the Painters' application should be dismissed because they still held bargaining rights on the date of application for certification – The Board found that the Painters filed a valid application for certification in the context of knowing that they were shortly to have their bargaining rights terminated, and that the application was properly treated under s. 111(3)(b) of the Act – Matter continues

BIGGS & NARCISO CONSTRUCTION SERVICES INC; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; RE LIUNA, LOCAL 1059, TIM SCOTT ....(Nov./Dec.) 727

Construction Industry – Bargaining Rights – Practice and Procedure – Termination – Trade Union – The Board confirmed that applicants seeking to terminate bargaining rights in the ICI sector may deliver their applications to either the employee bargaining agency or the local union with whom they have a relationship – The Board decided that the trade union named as the respondent has the obligation to give notice of the termination application to the Employee Bargaining Agency and the affiliated bargaining agents – Matter continues

KIDD MECHANICAL INC.; RE EMPLOYEES OF KIDD MECHANICAL INC. REPRESENTED BY VIKKI SCHLONIES; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ON ITS OWN BEHALF AND ON BEHALF OF ALL OF ITS AFFILIATED BARGAINING AGENTS..(Mar./Apr.) 282

Construction Industry – Bargaining Unit – Certification – Local 183 applied for certification under the construction industry provisions of the Act asserting that the locating work performed in an excavation project was construction industry work – Local 183 argued that the work was performed on a construction site and that it was necessary and integral to the work on those sites – The company argued that the purpose of the work was safety, not construction; that its contract was not with the constructor; and that the work was performed before construction began, which therefore could not be a part of the construction industry – The Board found that the work in question was "necessary and integral" to the construction activity as there was a clear connection between the work required to be performed by the locators and the work of the excavation that requires the locating work be undertaken – Therefore, it was construction industry work – Matter continues

TELECOM CANADA LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Mar./Apr.) 334

Construction Industry – Certification – Bargaining Unit – Practice and Procedure – Status – The employer and the union did not agree on the list of employees who were at work on the date of application and performing work within the scope of the bargaining unit – The employer challenged the sufficiency of the union's submissions as they failed to contain detailed facts and failed to establish a *prima facie* case as per the Board's Information Bulletin No. 9 – The Board confirmed that where a party states that a name belongs on the employee list, the submissions filed will generally be required to contain sufficient facts to establish that the person was at work and performing bargaining unit work for a majority of the day on the date of application – The Board found that the union's submissions were deficient as they did not describe the work being performed on the date of application notwithstanding that such information appeared to be available to the union – The Board directed the union to file any further submissions upon which it wished to rely – Matter continues

CONTERRA RESTORATION LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183 ....(May/June) 379

Construction Industry – Certification – Employer – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ....(Nov./Dec.) 760

Construction Industry – Certification – Practice and Procedure – Status – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51......................(Nov./Dec.) 733

Construction Industry – Certification – Related Employer – LIUNA sought to certify the employees of Mirtren Contractors Limited and shortly thereafter filed an application for relief under the related employer provision of the Act, citing also Mirtren Construction Limited and Mirtren Builders Ltd. (claim against latter company dropped) – The employees of Mirtren Contractors were represented by CLAC – Contractors asserted it had no employees in the bargaining unit sought by LIUNA - The Board found that although both Contractors and Construction were owned by one individual, they carried on business in two distinct divisions, geographically apart, with each division reporting to different management for operational and labour relations purposes – The Board dismissed the application for a declaration that the companies were related but, given there was no prejudice to Construction, was satisfied that it should invoke s. 112 to find that the responding party had been incorrectly named in the application for certification – Matters continue

MIRTREN CONTRACTORS LIMITED AND MIRTREN CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Sept./Oct.) 644

Construction Industry – Certification – Timeliness – Because of a defective initial delivery (by fax) of one of two applications for certification, and the subsequent delivery of the application by courier, the employer asserted that the application was untimely – The Board (differently constituted) ruled on the delivery some three weeks after it was actually made – The present panel held that the employer was required to file its response and Schedule A within two days of the delivery of the application – The Board rejected the employer's position that the application for certification was not "valid" until the Board exercised its discretion to extend the time for delivery: once filed with the Board, the application was always valid – The employer's failure to provide a timely response prejudiced the applicant's ability to ascertain where employees were working on the application date – One certificate issued; second matter continues

JAY-DEE CONCRETE FORMING, VANSMIT LTD. O/A; RE LABOURERS' INTERNATONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 71

Construction Industry – Certification – Timeliness – Voluntary Recognition – Bruce Power and BACU were bound to a collective agreement that provided that if bricklayers' work was performed by Aecon or another subcontractor, the subcontractor was required to sign a document ("Appendix E") recognizing the bargaining rights of BACU – Aecon signed the document and delivered it to Bruce Power who failed to deliver it to BACU – BACU applied to certify bricklayers employed by Aecon – Aecon's position was that it was already bound to a collective agreement as a result of signing Appendix E, thus the application was untimely – The issue before the Board was whether a voluntary recognition had been created, and a collective agreement reached, between Aecon and BACU when Aecon executed the Appendix E document but BACU did not – The Board held that once Aecon executed Appendix E, the document became a voluntary recognition agreement between Aecon and BACU – The Board found that the signature of Aecon evidenced its acceptance of the terms of the voluntary recognition agreement offered by BACU – Accordingly the employees subject to the certification application were covered by a collective agreement on the application date – Application dismissed as untimely

AECON CONSTRUCTION GROUP INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA...(May/June) 363

Construction Industry – Certification Where Act Contravened – Interference in Trade Unions – Intimidation and Coercion – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 1

Construction Industry – Certification Where Act Contravened – Interference with Trade Unions – Remedies – Unfair Labour Practice – The Carpenters commenced an organizing campaign by having an employee of Southend distribute cards – The owner's brother, who was the employee's supervisor, openly expressed his dislike of unions, and burned another employee's union card at the workplace, in front of several other employees – The employer argued that the discharge of the employee who began distributing cards was for excessive absences, and for drinking during lunch – The Board found that the termination of the employee effectively put an end to the organizing campaign – The Board preferred the discharged employee's evidence over that of the employer's witnesses – Although his attendance may have been at issue, it was not the reason for the discharge – Other employees were reprimanded for drinking at lunch; the inside organizer was terminated – The employer did nothing to distance himself from his brother's anti-union behaviour – The Board was satisfied that a representation vote would not reflect the true wishes of employees – Certificate granted

SOUTHEND DRYWALL & ACOUSTICS LTD.; RE UBCJA, LOCAL 2486..(Mar./Apr.) 317

Construction Industry – Collective Agreement – Grievance – This referral by Otis of a grievance centred around two elevator mechanics from IUEC Local 102, which is based out of Winnipeg, performing work in Terrace Bay, Ontario – The issue was what wage rate the Local 102 members were entitled to: their local wage rate, or the higher Toronto wage rate – A survey of the evolution of the collective agreement and associated letters of understanding revealed that any members working in areas other than their local area, at the request of their employer, would receive their local wage rate or the wage rate of the area they were working in, whichever was higher – Local 102 acknowledged that the collective agreement language on its face restricted the application of the Toronto wage rate to the City of Thunder Bay – The union submitted that the language of the collective agreement did not reflect the negotiation of the parties that the wage rate set for the City of Thunder Bay also would include the surrounding Northern areas – Local 102 asked the Board to rectify the collective agreement to reflect an error in the language used – The Board reviewed the criteria for rectification and determined there was no clear and easily fixable error in the collective agreement, as the parties significantly disagreed on what had been agreed to in negotiations – Consequently, the test for granting rectification laid out in *Nav Canada* was not met – The Board concluded there was no wage rate established for Terrace Bay and the Local 102 members were therefore entitled to their home wage rate – Grievance allowed

OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 102..(Jul./Aug.) 499

Construction Industry – Duty to Bargain in Good Faith – Employer – Unfair Labour Practice – In negotiating the renewal of the collective agreement, the employer tabled a proposal with respect to jurisdiction and contracting out provisions – These amendments pertained to only one of the members of the Skilled Trades Council, the IBEW, which claimed the employer's proposals were an attempt to bargain recognition provisions to impasse, in breach of the obligation to bargain in good faith –The Board noted that to determine if changes are truly inconsistent with the Act, the context of the particular collective agreement and circumstances must be reviewed – The Board found the proposal to change the jurisdiction clause did not change the description of the bargaining unit and the change to the contracting out wording did not breach the Act, as it was the same language that the other members of the council have lived with, nor does it threaten the long-term integrity of the bargaining unit or IBEW's bargaining rights in light of the provincial collective agreement which covers electrical work in the ICI sector – The Board determined that the employer's proposed amendments did not breach their obligation to bargain in good faith

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE ESSEX AND KENT COUNTIES SKILLED TRADES COUNCIL.. (Mar./Apr.) 275

Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 ....(Jan./Feb.) 20

Construction Industry – Health and Safety – Jurisdictional Dispute – *Trades Qualification and Apprenticeship Act* – The UA called the Health and Safety Inspector to seek a ruling to determine whether or not the work performed by Carpenters could only be done by a person who was licensed as a journeyman or apprentice plumber – The Inspector's Order required the work to be performed by plumbers – The Carpenters seek to have the Board suspend the Order pending the appeal – The Board applied its standard three part test to determine whether a suspension of the Order was appropriate – The first and third element of the test converge as the Regulations of the TQAA specify what training is required for specific trades, and the Board will likely find it unsafe for any person without such training to perform the work – The issue was simplified to an application of the work to the TQAA and Carpenters' and Plumbers' Regulations suggesting that the dispute was entirely a jurisdictional one and not a question of worker safety – Therefore a strong case for a successful appeal existed – Worker safety will not be affected by suspending the Order – There was prejudice to the employer if the Order was not suspended as the UA was seeking to disrupt the commercial arrangements between the employer and contractor – Order suspended until the appeal is determined

ACTION GROUP INC., AND DAN DIGNARD, INSPECTOR; RE UBCJA, LOCAL 1946; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 593 .... (Mar./Apr.) 223

Construction Industry – Interim Relief – Intervenor – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC .... (Jan./Feb.) 173

Construction Industry – Interim Relief – Unfair Labour Practice – During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C., AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD .... (Jan./Feb.) 85

Construction Industry – Jurisdictional Dispute – PCL subcontracted the work in dispute, the forming of walls by insulated concrete formwork (ICF), which is a relatively new building method or technology, to Elite, a subcontractor bound to a collective agreement with the Carpenters – The applicant Locals asserted that the work in dispute represented their respective traditional portion of concrete formwork in the ICI sector of the construction industry, while the responding parties asserted that virtually every aspect of the ICF construction differed from traditional concrete formwork – The Board found that the forming process reflected by ICF technology was not so markedly different than that reflected by traditional concrete forming that the wholesale rejection of area practice evidence with respect to the installation of traditional concrete forms was warranted – Accordingly, the Board found it appropriate to consider the area practice relied upon by the applicant Locals and found it overwhelmingly supported the assignment of work in dispute to the applicants – The totality of the evidence of employer practice also suggested that the applicants had a better claim to the assignment of work than did the Carpenters – After finding the other factors at best neutral, the Board was satisfied that there were compelling reasons to find in favour of the applicants notwithstanding the absence of a collective agreement relationship between each of them and Elite – The Board found the work in dispute ought to have been assigned to the applicants members

PCL CONSTRUCTORS CANADA LTD. AND ELITE BUILDING GROUP INC.; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736 .... (Sept./Oct.) 672

Construction Industry – Jurisdictional Dispute – Work in this dispute consisted of carpentry portions of concrete forming work for footings, retaining walls and planter boxes located outside of the building structure at the North Bay Regional Health Centre Project – The general contractor on the project, PCL was bound to both the Carpenters' and the Labourers' ICI agreements – PCL subcontracted certain concrete forming work to Downsview, which was not bound to the Carpenters' ICI agreement – Downsview assigned the concrete forming work to the Labourers – The Carpenters filed a grievance against PCL for violating the subcontracting clause of the ICI agreement – In response, the Labourers filed a jurisdictional dispute – A primary issue was whether the work in dispute fell within the ICI sector or in the roads sector of the construction industry – Considering the usual factors in sector disputes, the Board found that the work in dispute was work that fell within the ICI sector – The Board then proceeded to determine the merits of the jurisdictional dispute and found that the work in dispute ought to have been assigned to the Carpenters rather than to the Labourers – It was ICI work and the Carpenters had a collective agreement covering the work in dispute while the Labourers did not – The area practice evidence favoured the assignment of the work to the Carpenters – The employer practice evidence filed by the Labourers, PCL and Downsview was not persuasive and the economic and efficiency evidence favouring the Labourers was not sufficient enough to dislodge the significance of the collective agreement obligations owed to the Carpenters – Application allowed

PCL CONSTRUCTORS CANADA INC., THE DOWNSVIEW GROUP, GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, LOCAL 2486, AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA, LOCAL 493 AND UNIVERSAL WORKERS' UNION, LIUNA, LOCAL 183 .... (Nov./Dec.) 771

Construction Industry Grievance – CUSW referred two grievances to the Board, asserting rights as against AECL although the union only held bargaining rights with Bruce Power (who had a contractual relationship with AECL) – CUSW argued that (1) Bruce was its agent for executing collective agreements with contractors like AECL; and (2) the Board should find there is a collective agreement between CUSW and AECL so the union can reap the third party benefits of the specific agreements between Bruce and the AECL – The Board examined the language of the contracts and collective agreements and found that while there was the *possibility* of creating an agency relationship, none had been explicitly created by these parties – With respect to the third party benefits, the Board held that in the unlikely circumstance that it could fashion a remedy for a third party arising out of a contract not governed by the LRA, it would not be appropriate to do so here – CUSW had already obtained all that it bargained for with Bruce, and nothing in the AECL contract could or would deprive it of those rights – Grievances dismissed

ATOMIC ENERGY OF CANADA LIMITED; RE CANADIAN UNION OF SKILLED WORKERS .... (Mar./Apr.) 230

Construction Industry Grievance – Delay – Judicial Review – The Sheet Metal Workers and the IBEW sought judicial review of two Board decisions which found that a 1965 Working Agreement signed by Ellis Don did not confer bargaining rights on the unions and was not a recognition agreement – The IBEW also sought to challenge one of the Board decisions for delay – The Court found the Board's decision-making process in each case was transparent, intelligible and justifiable – On the issue of the two-year delay in issuing a decision, the Court held that the union failed to show any prejudice, and was unable to rebut the presumption of regularity of the Board's proceedings – Applications dismissed

ELLIS-DON LIMITED, ELLIS DON CORPORATION AND OLRB; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE..................(Nov./Dec.) 1016

Construction Industry Grievance – Estoppel – *Human Rights Code* – The grievance arose from the lay-off of a journeyman electrician over the age of 50 where the Principal Agreement required one in every five journeymen to be "fifty (50) years of age or older, where available" – The Board found that the respondent was not estopped from asserting the section was illegal because the respondent raised the issue in bargaining and rather than taking the issue any further, the parties simply agreed to disagree over whether it was contrary to the Code – The Board found the section required an employer to discriminate among employees with respect to their employment by reason of their age –The Board would not take administrative notice, nor was it persuaded on the evidence, that electricians aged 50 and older constituted a disadvantaged group – The Board concluded that the section at issue did not constitute a special program within the meaning of the *Code* as it found no "rational connection between any restrictions in eligibility and the purpose of the special program itself" – Accordingly, the respondent was not found to have violated the Principal Agreement – Grievance dismissed

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 353; RE THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS CONSTRUCTION COUNCIL OF ONTARIO ... (Sept./Oct.) 583

Construction Industry Grievance – Estoppel – The union alleged that fire restoration work performed by Jacobs Catalytic was construction work required to be performed under the Principal Agreement – The Board considered, assuming without finding the work to be construction, whether the union was estopped from enforcing the Principal Agreement – First, the Board was persuaded that the past practice evidence of fire restoration work having been performed by union members under the Maintenance Agreement constituted a representation by the union that it would not enforce the Principal Agreement – Second, the Board found no specific action or inaction taken on the part of Jacobs based on the representation – Unlike a previous case, Jacobs did not enter into a contract with Petro-Canada nor negotiate its rates with Petro-Canada based on the representation – Finally, the Board also found that Jacobs would suffer no detriment if the union were permitted to enforce the terms of the Principal Agreement – Accordingly, the union was not estopped from enforcing the Principal Agreement – Matter continues to determine whether any or all of the work is construction

JACOBS CATALYTIC LTD.; RE IBEW, LOCAL 353; THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO AND GENERAL PRESIDENTS' MAINTENANCE COMMITTEE FOR CANADA .... (Sept./Oct.) 628

Construction Industry Grievance – Judicial Review – The union sought review of the Board's interpretation of the term "working conditions" in the collective agreement – The Board found that the employer's requirement that workers wear metatarsal safety boots were an enhanced safety policy and not an "exceptional" working condition – The Court held that the Board's contextual approach to its interpretation of the collective agreement was reasonable – Application dismissed

AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC. AND OLRB; RE IBEW LOCAL 105..(Nov./Dec.) 1010

Construction Industry Grievance – Reconsideration – Hydro One sought reconsideration of the Board's decision that it had violated the contracting out provisions of the Principal Agreement – On a more extensive review of the case law the Board found no support for Hydro One's position that no "contracting out" occurs where an employer enters into an agreement with another entity to perform work on its behalf that would otherwise be performed by bargaining unit employees where the employer had no other option (Hydro One's arrangement with CN required Hydro One to have its transformer off-loaded from a rail car by employees of a subcontractor to CN which were not bound to the Principal Agreement) – The Board found that the situation that Hydro One found itself in may be relevant to remedy, but not to whether the contracting out provision of the Principal Agreement had been violated – Reconsideration denied

HYDRO ONE NETWORKS INC.; RE CANADIAN UNION OF SKILLED WORKERS..(May/June) 394

Construction Industry Grievance – The Board was asked to determine whether OPG's decision to bar an individual (an employee of Aecon) from its sites is subject to the "just cause" standard established by the collective agreement between the UA and EPSCA – OPG acknowledged that it was a signatory to the EPSCA agreement, but asserted that it was acting as an owner, constructor or licensee, and not as an employer, when it banned the individual – The Board held that OPG was exercising power in respect of the grievor's employment when it banned him from its sites – The Board found that there is nothing in the Act or the EPSCA Agreement that permits an entity to claim it is not subject to the Agreement when the entity wears an "owner" hat as opposed to an "employer" hat – OPG's decision to ban the employee was independent of the employment relationship the employee had with Aecon; OPG's actions come within the scope of the EPSCA Agreement, and it must establish that those actions meet the standard of the Agreement – Matter continues

ONTARIO POWER GENERATION INC., ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA.............................. (Mar./Apr.) 298

Crown Employees Collective Bargaining Act – Bargaining Rights – Sale of a Business – This application under s. 10 of the *Crown Employees Collective Bargaining Act* (CECBA) and s. 69 of the *Labour Relations Act* (LRA) relates to the Crown's decision to cancel contracts between the Crown and York Detention Centre Ltd. (YDC) resulting in the lay off of members of OPSEU – The issues were (1) whether the termination of the Crown's contract with YDC and the transfer of young offenders to the Roy McMurtry Youth Centre (RMYC) amounted to a transfer of an undertaking for the purposes of CECBA such that s. 69 of the LRA applied to bind the Crown to the YDC Collective Agreement and (2) whether such a transfer would grant YDC employees collective agreement rights at RMYC in Brampton notwithstanding that the geographic scope of the collective agreement is limited to Toronto – The Board found that the right to house young offenders, the obligation to provide them services and the funding necessary to do so as derived from the contract was transferred from YDC back to the Crown at RMYC – These were the essential elements of YDC's undertaking, without which it could not operate its business – Accordingly, the Board found that there had been a transfer of an undertaking within the meaning of CECBA from YDC to the Crown at RMYC such that s. 69 of the LRA applied, binding the Crown to the YDC Collective Agreement – On the second issue, the Board followed the principle found in *Silverwood Dairies* that successor rights provisions do not operate to extend bargaining rights beyond the geographic scope of the collective agreement binding the predecessor – Accordingly, the Board denied OPSEU's request for orders requiring the Crown to recognize the collective agreement rights of YDC employees at RMYC

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CHILDREN AND YOUTH SERVICES, YORK DETENTION CENTRE LTD. AND NORTHERN YOUTH SERVICES INC.; RE OPSEU ....(Jul./Aug.) 471

Delay – Abandonment – Bargaining Rights – Construction Industry – Related Employer – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA...(Nov./Dec.) 839

Delay – Construction Industry Grievance – Judicial Review – The Sheet Metal Workers and the IBEW sought judicial review of two Board decisions which found that a 1965 Working Agreement signed by Ellis Don did not confer bargaining rights on the unions and was not a recognition agreement – The IBEW also sought to challenge one of the Board decisions for delay – The Court found the Board's decision-making process in each case was transparent, intelligible and justifiable – On the issue of the two-year delay in issuing a decision, the Court held that the union failed to show any prejudice, and was unable to rebut the presumption of regularity of the Board's proceedings – Applications dismissed

ELLIS-DON LIMITED, ELLIS DON CORPORATION AND OLRB; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE..................(Nov./Dec.) 1016

Delay – Duty of Fair Representation – Health and Safety – Judicial Review – Settlement – The applicant sought review of two Board decisions, one dismissing a s. 74 complaint, and the second dismissing a s. 50 OHSA application in favour of an ongoing proceeding before the Grievance Settlement Board – The matter was settled at the GSB, and the applicant asked the Court to set aside the Minutes of Settlement (MOS) – The Court found there was no evidence of the applicant's diminished capacity during the GSB proceeding, so the MOS was fatal to his claim – In addition the MOS was not a

reviewable decision – The applications for review of the Board rulings were dismissed for delay

DONALD AMODEO; RE ONTARIO MINISTRY OF LABOUR (HER MAJESTY IN RIGHT OF ONTARIO), ATTORNEY GENERAL OF ONTARIO, GRIEVANCE SETTLEMENT BOARD, OPSEU AND OLRB .... (Mar./Apr.) 360

Discharge – Certification – Interim Relief – Unfair Labour Practice – The union applied for interim reinstatement of the worker contending he was terminated for his involvement in the organizing drive – The evidence showed that prior to his termination the union had signed up five members (in a 65 member bargaining unit) and after his termination the union signed up an additional 37 members and filed for certification – As the worker's termination did not stall the organizing drive (indeed it seemed to propel it), the Board found that interim relief was not necessary to prevent irreparable harm nor was it necessary to achieve other significant labour relations objectives – Accordingly all of the conditions under s. 98(2) were not met – Application dismissed

NOVOTEL CANADA INC., ACCOR CANADA INC., NOVOTEL OTTAWA; RE HOSPITALITY & SERVICE TRADE UNION, LOCAL 261 AND JEFFREY SEGAT .... (Mar./Apr.) 287

Discharge – Duty to Bargain in Good Faith – *Prima facie* motion – Strike – Unfair Labour Practice – The parties settled a strike leaving one outstanding issue: whether Vale's refusal to agree to an arbitration process that could result in the reinstatement of striking employees discharged during the strike violated s. 17 of the Act – The Board noted that USW's interpretation of *Royal Oak* would mean that it would be a breach of the duty to bargain for a party to maintain an objectively unreasonable position to impasse, regardless of the party's motivation for doing so, and that this position would effectively render "illegal *per se*" that which neither any specific provision nor the scheme of the Act as a whole makes illegal – The Board concluded that the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike was not sufficient in and of itself to give rise to a breach of the duty to bargain – Next, concerning Vale's position that USW had not pled a *prima facie* case, the Board held that the USW had pled that Vale maintained to impasse a position of refusing to agree to just cause arbitration and that this was unusual and *Royal Oak* provides a basis for arguing that it is objectively unreasonable – Accordingly, the Board dismissed the prima facie motion, finding that a reasonable argument could be made on the basis of USW's pleadings which would result in the conclusion that Vale breached its duty to bargain – Finally, the Board found that Vale was entitled to lead the evidence with respect to the reasons it maintained its position – Matter continues

VALE INCO LIMITED; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 6500 AND ITS LOCAL 6200..................(Jul./Aug.) 548

Discharge for Union Activity – Certification Where Act Contravened – Unfair Labour Practice – During the course of CEP's organizing campaign, Boehmer and some of its employees distributed written communications which the union alleged were false and misleading and which implied that unionization would undermine the viability of the enterprise and would therefore compromise employees' job security – CEP lost the representation vote by a large margin, despite obtaining the support of a majority of the employees as of the application date – The Union alleged that literature distributed by, or with the approval

of, Boehmer threatened the livelihood of employees and had a chilling effect on the voters – The issue before the Board was whether Boehmer violated the Act and if so, whether CEP was entitled to remedial certification despite having lost the representation vote – A majority of the Board found that a number of events at the workplace did not constitute unfair labour practices; however, the written communications and the links made in those communications between unionization and job security did constitute a violation of the Act – The majority found that neither a second representation vote alone nor the Board's other customary remedies in combination with a second vote would adequately respond to the threats raised by Boehmer's written communications – The union was entitled to remedial certification – Certificate issued

BOEHMER BOX LP; RE CEP .... (Mar./Apr.) 237

Discharge for Union Activity – Interim Relief – Practice and Procedure – The SEIU sought an interim order for reinstatement of a probationary employee – A decision had been made by the employee's supervisor that she was not suitable for permanent employment – This decision was not communicated to the employee because she had requested a leave of absence to complete a professional examination – Upon her return, the employee learned of the organizing campaign and began showing her support – She was terminated five days later – SEIU alleged that the discharge effectively halted the union's organizing efforts – Princess Gardens conceded that a campaign to establish bargaining rights was underway and that there was a serious issue to be decided in the pending proceeding – The Board did not find it necessary to determine whether relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives or whether the balance of harm favoured the granting of the interim relief, because it appeared to the Board that the dismissal was unrelated to the exercise of the employee's rights in support of the union – The Board found that Princess Gardens had a plausible basis for ending the employee's employment and its explanation for the delay in informing her of the dismissal was also plausible – The Board found on a preliminary assessment that the discharge was unrelated to the exercise of rights under the Act by an employee and therefore the Board was prevented from exercising its discretion to reinstate – Application for interim relief dismissed

PRINCESS GARDENS RETIREMENT RESIDENCE; RE SEIU, LOCAL 1 CANADA .... (Mar./Apr.) 309

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union – The four criteria under s. 98(2) having been met, the Board ordered interim reinstatement – Interim Relief granted

SOBEYS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A .... (Nov./Dec.) 825

Displacement – Certification – Natural Justice – Practice and Procedure – Representation Vote – Trade Union – In a displacement application for certification, Workers United Ontario Council (WUOC), the losing trade union in a close vote, raised an issue concerning the conduct of the representation vote – The vote consisted of two one-hour polls, one in the morning, the other in the evening – During the first fifteen minutes of the evening poll, the building doors were locked barring access to potential voters – Inquiries made by WUOC did not indicate that any individual was prevented from voting due to lack of access – WUOC requested another vote which UNITE HERE opposed – The Board followed the principle that "when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election" – The Board found that voters are entitled to a high standard of integrity, but not perfection in the conduct of representation votes – The Board concluded that there was no evidence the error prevented anyone from voting, and declined to disregard the outcome of the balloting – Matter continues

NORDIC GAMING CORPORATION; RE WORKERS UNITED ONTARIO COUNCIL; RE UNITE HERE ....(Jul./Aug.) 495

Duty of Fair Representation – Conflict of Interest – The applicant claimed that the trade union had breached its duty of fair representation when it refused to pursue her termination grievance to arbitration – Previous to the applicant's discharge, the Local had filed suit against the applicant for defamation in an unrelated incident – The applicant was granted representation by the National union and a favourable legal opinion was prepared – The Local union representative intervened and fresh evidence was acquired which was not shared with the author of the previous legal opinion; instead it was given to a new author and an unfavourable opinion was produced – All parties were able to address the membership at the grievance arbitration vote but no mention was made by the local rep of the contradictory legal opinion; a vote of the membership was held and it was decided that arbitration was not appropriate given the circumstances – The Board held that there was a conflict of interest between the applicant and the Local union due to the pending law suit and that the Local union had breached their duty of fair representation when there was no mention by the Local union of the legal opinion favourable to the applicant nor were any actions taken to distinguish the two opinions at the membership vote – Application allowed; Board ordered the grievance to arbitration

SHERYL ANNE TOOP; RE CANADIAN UNION OF PUBLIC EMPLOYEES AND CUPE LOCAL 1974...(Nov./Dec.) 818

Duty of Fair Representation – Delay – Health and Safety – Judicial Review – Settlement – The applicant sought review of two Board decisions, one dismissing a s. 74 complaint, and the second dismissing a s. 50 OHSA application in favour of an ongoing proceeding before the Grievance Settlement Board – The matter was settled at the GSB, and the applicant asked the Court to set aside the Minutes of Settlement (MOS) – The Court found there was no evidence of the applicant's diminished capacity during the GSB proceeding, so the MOS was fatal to his claim – In addition the MOS was not a reviewable decision – The applications for review of the Board rulings were dismissed for delay

DONALD AMODEO; RE ONTARIO MINISTRY OF LABOUR (HER MAJESTY IN RIGHT OF ONTARIO), ATTORNEY GENERAL OF ONTARIO, GRIEVANCE SETTLEMENT BOARD, OPSEU AND OLRB ....(Mar./Apr.) 360

Duty of Fair Representation – Employment Standards – Chrysler provided notice of indefinite layoff to 1,110 employees, in the middle of which was a planned two-week shutdown of the affected part of the company - The union negotiated an opportunity for 850 of the most junior employees to earn wages for those two weeks – The more senior employees, which included the applicant, were not afforded the same opportunity but were informed the lay-off would not continue – The applicant argued he was entitled to payment for the same two week period as per the notice provisions of the *ESA* and the union's failure to seek redress for this breach as well as the work opportunity negotiated for the most junior employees violated the duty of fair representation – The Board held that the proper focus of a s.74 complaint was whether the union's conduct was arbitrary, discriminatory, or in bad faith, and not an exhaustive assessment of the *ESA* challenge – The Board found the union had appropriately balanced the interests of all members in negotiating the work opportunity – Application dismissed

GEORGE CARTER; RE NATIONAL AUTOMOBILE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1285; RE CHRYSLER CANADA INC. .... (Sept./Oct.) 625

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – After finding that the complainant had not made out a prima facie case, and reviewing eight previous duty of fair representation complaints, the Board found the complainant to be a vexatious litigant on the basis of the following material: he brought multiple proceedings making basically the same allegations; he consistently sought relief the Board would not conceivably grant; he made unjustifiable and unreasonable aspersions against the lawyers representing the Union and its officials and representative, and against the adjudicators and officers of the Board; for the Board to address the series of exaggerated and unsupported allegations was an abuse of public resources and an abuse of process – The applicant was declared a vexatious litigant and not permitted to file a complaint against the union or employer without leave of the Board – Application dismissed

DR. PETER A. KHAITER; RE YORK UNIVERSITY FACULTY ASSOCIATION (YUFA) .... (Sept./Oct.) 622

Duty to Bargain in Good Faith – A variety of incidents occurred during the negotiation of a renewal collective agreement between the parties: a termination application was made, but the union was able to withstand the challenge; a sizeable minority voted against the union, and the union alleged employer initiation (given the result of the vote, the allegation was not adjudicated); notice to bargain was given by the union; a conciliation officer was appointed; the employer offered to have the current and future collective agreements settled by interest arbitration; the union declined the proposal; a "no board" was issued; the employer tabled a "final offer to settle negotiations" and proposed that if the wage component remained at issue, the parties could agree on language and refer the wage issue to an interest arbitrator; the union sought clarification of one aspect of the wage issue; the employer's clarification was not a "model of clarity"; the employer subsequently withdrew its final offer and did not re-table a fresh offer; in the meantime, the employer implemented a wage raise and at the same time advised the union it would no longer deduct and remit union dues – The Board held that the *LRA* does not mandate that unions and employers enter into a collective agreement, only that they make every effort to do so, and bargain in good faith in the process – These obligations continue beyond the expiry of the statutory freeze, where there may be a strike or lock-out, and even after a legal strike or lock-out has actually commenced – The Board found the employer violated s. 17 when it failed to state its wage proposal clearly and when it withdrew its offer without warning and without re-tabling an offer that the union could address – Application allowed: employer ordered to re-table offer and, if offer is accepted, to reinstate dues deductions

BOLDRICK BUS SERVICES LTD.; RE TEAMSTERS LOCAL UNION 91. (Sept./Oct.) 605

Duty to Bargain in Good Faith – Collective Agreement – OPSEU complained that MPAC's revocation of an offer for the renewal of a collective agreement and subsequent tabling of a new offer following the release of the provincial budget was a violation of the employer's duty to bargain in good faith – The Board recognized that its jurisprudence reflects an inherent conflict: on the one hand, there is an element of voluntarism in the concept of bargaining which means that the parties are each expected to maximize their own self interest and are not required to agree to any particular collective agreement; on the other hand, there is an element of compulsion introduced by the obligation to bargain in good faith and the obligation to make every reasonable effort to make a collective agreement – Further, negotiation is a fluid process and may encounter changes in circumstances that require a shift or even reversal in bargaining position – The Board held that the introduction of the budget and applicable FAQs were relevant considerations for the employer's position, and accepted that "the spirit and intent" of these documents gave the employer *bona fide* reasons to change its position – Application dismissed

MUNICIPAL PROPERTY ASSESSMENT CORPORATION; RE OPSEU.....(May/June) 425

Duty to Bargain in Good Faith – Construction Industry – Employer – Unfair Labour Practice – In negotiating the renewal of the collective agreement, the employer tabled a proposal with respect to jurisdiction and contracting out provisions – These amendments pertained to only one of the members of the Skilled Trades Council, the IBEW, which claimed the employer's proposals were an attempt to bargain recognition provisions to impasse, in breach of the obligation to bargain in good faith –The Board noted that to determine if changes are truly inconsistent with the Act, the context of the particular collective agreement and circumstances must be reviewed – The Board found the proposal to change the jurisdiction clause did not change the description of the bargaining unit and the change to the contracting out wording did not breach the Act, as it was the same language that the other members of the council have lived with, nor does it threaten the long-term integrity of the bargaining unit or IBEW's bargaining rights in light of the provincial collective agreement which covers electrical work in the ICI sector – The Board determined that the employer's proposed amendments did not breach their obligation to bargain in good faith

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE ESSEX AND KENT COUNTIES SKILLED TRADES COUNCIL..(Mar./Apr.) 275

Duty to Bargain in Good Faith – Discharge – *Prima facie* motion – Strike – Unfair Labour Practice – The parties settled a strike leaving one outstanding issue: whether Vale's refusal to agree to an arbitration process that could result in the reinstatement of striking employees discharged during the strike violated s. 17 of the Act – The Board noted that USW's interpretation of *Royal Oak* would mean that it would be a breach of the duty to bargain for a party to maintain an objectively unreasonable position to impasse, regardless of the party's motivation for doing so, and that this position would effectively render "illegal *per se*" that which neither any specific provision nor the scheme of the Act as a whole makes illegal – The Board concluded that the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike was not sufficient in and of itself to give rise to a breach of the duty to bargain – Next, concerning Vale's position that USW had not pled a *prima* *facie* case, the Board held that the USW had pled that Vale maintained to impasse a position of refusing to agree to just cause arbitration and that this was unusual and *Royal Oak* provides a basis for arguing that it is objectively unreasonable – Accordingly, the Board dismissed the prima facie motion, finding that a reasonable argument could be made on the basis of USW's pleadings which would result in the conclusion that Vale breached its duty to bargain – Finally, the Board found that Vale was entitled to lead the evidence with respect to the reasons it maintained its position – Matter continues

VALE INCO LIMITED; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 6500 AND ITS LOCAL 6200..................(Jul./Aug.) 548

Duty to Bargain in Good Faith – Unfair Labour Practice – During bargaining for a renewal collective agreement, OPSEU sought the names and telephone numbers of all its members from the employer – The employer resisted, relying on a provision in the parties' collective agreement that limited disclosure of employees' contact information to once per year, and exempted those employees who objected to having their contact information given to the union – OPSEU alleged the employer was bargaining in bad faith and interfering with the union's statutory right to represent its members; it was not specifically relying on the alleged breach of the collective agreement – The Board found the employer has a positive obligation to provide the information to the union to facilitate equal bargaining positions in the collective bargaining relationship – The union's request for the information was made in the context of giving notice to bargain a new collective agreement – The employer's refusal to furnish the information was an interference with the union's administration of its bargaining rights – Application allowed

OAKLANDS REGIONAL CENTRE; RE OPSEU..(Sept./Oct.) 658

Employee – Bargaining Rights – Status – Termination – IBEW Local 115 held bargaining rights in the ICI sector and in all other sectors in Board Area 12 – In a previous decision, the Board held that the termination application was untimely with respect to the ICI sector, but was timely as it related to all other sectors – On the date of application, the individual applicant performed ICI work for the majority of the day and non-ICI work for a minority of the day – The issue before the Board was whether an employee must spend a majority of his/her work day performing bargaining unit work in order to be an "employee in a bargaining unit" for the purposes of a termination application – The Board found that applying the "majority of time test to sectors" used in certification applications did not make labour relations sense in the context of termination applications – There was no compelling justification to disqualify an individual as an employee of the bargaining unit in circumstances where that individual, on the date of application, performed work within the geographic area of the bargaining unit, within the scope of the bargaining unit and of the type covered by the collective agreement or certificate in the relevant sector, albeit not for the majority of the workday – The Board found that the applicant was an employee in the bargaining unit on the date of application – The Board found that the majority of time principle, as it relates to sectors, was not applicable to termination applications in the construction industry – Ballot to be counted

TERRY SHORTT ELECTRICAL SERVICES LTD.; RE GLYNN SAYEAU; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO QUINTE & ST. LAWRENCE ELECTRICAL WORKERS LOCAL UNION 115.....................(Mar./Apr.) 342

Employee – Bargaining unit – Certification – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

RAINBOW CONCRETE INSDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 218

Employee – Employer – Health and Safety – These applications concern the health and safety of paramedics (employees of Essex represented by CUPE) in relation to communications systems which the MOHLTC has the sole and exclusive responsibility to provide and operate – There were six issues over which Essex and CUPE disagreed with the MOHLTC: the need for a second portable radio on an ambulance crew so that both crew members would have a portable radio; testing emergency buttons on the radios; preventative maintenance of the radios; flagging of potentially dangerous addresses; mike to mike functions on cell phones; and information on defects in the system – The Board reviewed the factual context, the hazards faced by paramedics, and the MOHLTC's role with respect to the provision of ambulance services in Essex – The Board found that while MOHLTC was not the employer of the paramedics, it did have some of the obligations of an employer under the OHSA to the paramedics – The Board found a high level of integration between the communications and dispatch functions performed by the MOHLTC and the service functions performed by Essex – The Board noted that the paramedics were under the constant direction and control of [MOHLTC's] Central Ambulance Communication Centre from the beginning to the end of their shifts – After an extensive review of the case law, the Board found the integration of these systems was sufficient to impose upon the MOHLTC some of the obligations of an employer in relation to the paramedics–given that the contiguous sphere of operations with Essex meant that MOHLTC's activities could pose a risk of harm to the paramedics – Alternatively the Board found the MOHLTC, although a non-natural person, could be a supervisor under the Act, and given the authority (complete and exclusive control over the communications system it requires the paramedics to use) it exercised over the paramedics, it was their supervisor – The Board went on to find that the MOHLTC did breach certain obligations with respect to the six issues as an employer (and alternatively as a supervisor) in relation to the paramedics with respect to the communications systems – Declarations, orders and directions made

MINISTRY OF HEALTH AND LONG-TERM CARE, LAND AMBULANCE PROGRAMS; RE CUPE LOCAL 2974.1 AND R. TAGGART, INSPECTOR; RE COUNTY OF ESSEX-WINDSOR..(Jan./Feb.) 108

Employer – Accreditation – Construction Industry – Practice and Procedure – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed

THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089 .... (Nov./Dec.) 994

Employer – Certification – Construction Industry – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 .... (Nov./Dec.) 760

Employer – Construction Industry – Duty to Bargain in Good Faith – Unfair Labour Practice – In negotiating the renewal of the collective agreement, the employer tabled a proposal with respect to jurisdiction and contracting out provisions – These amendments pertained to only one of the members of the Skilled Trades Council, the IBEW, which claimed the employer's proposals were an attempt to bargain recognition provisions to impasse, in breach of the obligation to bargain in good faith –The Board noted that to determine if changes are truly inconsistent with the Act, the context of the particular collective agreement and circumstances must be reviewed – The Board found the proposal to change the jurisdiction clause did not change the description of the bargaining unit and the change to the contracting out wording did not breach the Act, as it was the same language that the other members of the council have lived with, nor does it threaten the long-term integrity of the bargaining unit or IBEW's bargaining rights in light of the provincial collective agreement which covers electrical work in the ICI sector – The Board determined that the employer's proposed amendments did not breach their obligation to bargain in good faith

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE ESSEX AND KENT COUNTIES SKILLED TRADES COUNCIL .... (Mar./Apr.) 275

Employer – Employee – Health and Safety – These applications concern the health and safety of paramedics (employees of Essex represented by CUPE) in relation to communications systems which the MOHLTC has the sole and exclusive responsibility to provide and operate – There were six issues over which Essex and CUPE disagreed with the MOHLTC: the need for a second portable radio on an ambulance crew so that both crew members would have a portable radio; testing emergency buttons on the radios; preventative maintenance of the radios; flagging of potentially dangerous addresses; mike to mike functions on cell phones; and information on defects in the system – The Board reviewed the factual context, the hazards faced by paramedics, and the MOHLTC's role with respect to the provision of ambulance services in Essex – The Board found that while MOHLTC was not the employer of the paramedics, it did have some of the obligations of an employer under the OHSA to the paramedics – The Board found a high level of integration between the communications and dispatch functions performed by the MOHLTC and the service functions performed by Essex – The Board noted that the paramedics were under the constant direction and control of [MOHLTC's] Central Ambulance Communication Centre from the beginning to the end of their shifts – After an extensive review of the case law, the Board found the integration of these systems was sufficient to impose upon the MOHLTC some of the obligations of an employer in relation to the paramedics–given that the contiguous sphere of operations with Essex meant that MOHLTC's activities could pose a risk of harm to the paramedics – Alternatively the Board found the MOHLTC, although a non-natural person, could be a supervisor under the Act, and given the authority (complete and exclusive control over the communications system it requires the paramedics to use) it exercised over the paramedics, it was their supervisor – The Board went on to find that the MOHLTC did breach certain obligations with respect to the six issues as an employer (and alternatively as a supervisor) in relation to the paramedics with respect to the communications systems – Declarations, orders and directions made

MINISTRY OF HEALTH AND LONG-TERM CARE, LAND AMBULANCE PROGRAMS; RE CUPE LOCAL 2974.1 AND R. TAGGART, INSPECTOR; RE COUNTY OF ESSEX-WINDSOR .... (Jan./Feb.) 108

Employer Support – Certification – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the

company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 ....(Nov./Dec.) 850

Employer Support – Certification – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 ....(Nov./Dec.) 850

Employment Standards – Duty of Fair Representation – Chrysler provided notice of indefinite layoff to 1,110 employees, in the middle of which was a planned two-week shutdown of the affected part of the company - The union negotiated an opportunity for 850 of the most junior employees to earn wages for those two weeks – The more senior employees, which included the applicant, were not afforded the same opportunity but were informed the lay-off would not continue – The applicant argued he was entitled to payment for the same two week period as per the notice provisions of the *ESA* and the union's failure to seek redress for this breach as well as the work opportunity negotiated for the most junior employees violated the duty of fair representation – The Board held that the proper focus of a s.74 complaint was whether the union's conduct was arbitrary, discriminatory, or in bad faith, and not an exhaustive assessment of the *ESA* challenge – The Board found the union had appropriately balanced the interests of all members in negotiating the work opportunity – Application dismissed

GEORGE CARTER; RE NATIONAL AUTOMOBILE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1285; RE CHRYSLER CANADA INC. ....(Sept./Oct.) 625

Employment Standards – The Board considered the criteria for establishing wilful misconduct that would disentitle an employ from receiving termination and severance pay – The applicant employee sought review of an ESO's refusal to award him payment, having found that the employee's incarceration was a product of his own misconduct – The employee argued he was absent against his will, and his circumstances prevented him from being able to call-in his absence, a violation of an explicit company rule – The Board rejected the suggestion articulated in the Ministry of Labour's policy manual that the mere failure to follow a company rule was sufficient to deprive the employee of his or her entitlements under the ESA: the failure must be the result of an intentional action, conscious, deliberate and defiant of the employer's authority – Equally, the employment relationship was not frustrated because the employee's failure to comply with the rule did not seriously interfere with his job duties, and neither his absence nor his inability to call-in could be said to be voluntary – Application allowed

REA INTERNATIONAL INC. O/A ATLAS FLUID SYSTEMS AND DIRECTOR OF EMPLOYMENT STANDARDS; RE HARPAL SINGH.................................(Nov./Dec.) 794

Employment Standards – The employer sought review of an order requiring it to pay vacation pay to the employee, against whom the employer had a court order for restitution following a conviction for theft – The Board found that the wages were withheld before the conviction and restitution order, and such withholding was in violation of the set-off provisions of the Act – The employer is not allowed to put itself in a better position than another debtor by withholding wages – There was no authorization for the set-off, and the court order only required that the employee make reasonable efforts to comply – Application dismissed

GRAPPLE MARKETING INC. c.o.b. as KWIK KOPY DESIGN AND PRINT CENTRE; RE BONNIELEE HARRISON AND DIRECTOR OF EMPLOYMENT STANDARDS .... (Mar./Apr.) 272

Employment Standards – The employer sought review of an order to pay overtime to its former executive chef – The Board found that the employee's work was supervisory or managerial in character so that he would normally be exempt from the overtime provisions of the Act – The Board further determined that the chef's assisting the line cooks during peak hours was irregular or exceptional and did not remove him from the exemption to overtime pay – However, the Board considered, for the first time, the significance of s. 22(9) of the Act, where an employee's time is divided between exempt work and non-exempt work and includes hours that would qualify for overtime pay – The Board held that the chef was entitled to overtime for those weeks where he spent more than 50% of his time performing tasks that were not supervisory or managerial – Application allowed in part

GLENDALE GOLF AND COUNTRY CLUB, LIMITED; RE MASSIMO SANAGO AND DIRECTOR OF EMPLOYMENT STANDARDS ....(Jan./Feb.) 50

Employment Standards – The employer sought review of an order to pay compensation for alleged violations of the pregnancy provisions of the *Employment Standards Act, 2000* – The employee worked as a customer service representative for the employer who operated a call centre – Employees were engaged in campaigns handling either inbound calls (assisting callers with purchases they had already made) or outbound calls (offering products for sale to current or new customers) – The employee's work history showed that she had worked almost exclusively on the inbound side of the operation prior to her last leave – When she returned from her leave, the employer was winding down two inbound campaigns and assigned the employee to outbound work – Following several months in the new position, where the employee performed less successfully than her colleagues, she was terminated – The employer conceded that the employee was entitled to termination and severance pay, but challenged the order for compensation – The Board found that the inbound and outbound position were not substantially and qualitatively the same, and the employee held an inbound position when her leave commenced – At her return, there was no inbound position to which she could return – The Board held that the outbound position was sufficiently comparable to the inbound position to fulfil the employer's obligations to place the employee following her leave – Order amended accordingly; termination and severance pay payable

TRG CUSTOMER SOLUTIONS INC.; RE AIMERANCE KABONGO AND DIRECTOR OF EMPLOYMENTS STANDARDS..(Jan./Feb.) 190

Estoppel – Construction Industry Grievance – *Human Rights Code* – The grievance arose from the lay-off of a journeyman electrician over the age of 50 where the Principal Agreement required one in every five journeymen to be "fifty (50) years of age or older, where available" – The Board found that the respondent was not estopped from asserting the section was illegal because the respondent raised the issue in bargaining and rather than taking the issue any further, the parties simply agreed to disagree over whether it was contrary to the Code – The Board found the section required an employer to discriminate among employees with respect to their employment by reason of their age –The Board would not take administrative notice, nor was it persuaded on the evidence, that electricians aged 50 and older constituted a disadvantaged group – The Board concluded that the section at issue did not constitute a special program within the meaning of the *Code* as it found no "rational connection between any restrictions in eligibility and the purpose of the special program itself" – Accordingly, the respondent was not found to have violated the Principal Agreement – Grievance dismissed

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 353; RE THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS CONSTRUCTION COUNCIL OF ONTARIO ... (Sept./Oct.) 583

Estoppel – Construction Industry Grievance – The union alleged that fire restoration work performed by Jacobs Catalytic was construction work required to be performed under the Principal Agreement – The Board considered, assuming without finding the work to be construction, whether the union was estopped from enforcing the Principal Agreement – First, the Board was persuaded that the past practice evidence of fire restoration work having been performed by union members under the Maintenance Agreement constituted a representation by the union that it would not enforce the Principal Agreement – Second, the Board found no specific action or inaction taken on the part of Jacobs based on the representation – Unlike a previous case, Jacobs did not enter into a contract with Petro-Canada nor negotiate its rates with Petro-Canada based on the representation – Finally, the Board also found that Jacobs would suffer no detriment if the union were permitted to enforce the terms of the Principal Agreement – Accordingly, the union was not estopped from enforcing the Principal Agreement – Matter continues to determine whether any or all of the work is construction

JACOBS CATALYTIC LTD.; RE IBEW, LOCAL 353; THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO AND GENERAL PRESIDENTS' MAINTENANCE COMMITTEE FOR CANADA .... (Sept./Oct.) 628

Evidence – Natural Justice – Practice and Procedure – Trade Union – UNITE HERE brought a motion to admit the transcripts taken by a court reporter during eleven hearing days presided over by the Chair, who was appointed a Judge of the Superior Court of Justice of Ontario, and as a result was unable to continue to hear and determine these proceedings – UNITE HERE had been granted permission to have a court reporter create transcripts of the evidence with the usual understanding that the transcripts must be shared with the other parties and the Board and were not an official record – At a reconstituted hearing before a different Vice-Chair, the use of these transcripts for the purpose of expediting the proceedings was explored – Workers United Ontario Council (WUOC) indicated that it was not prepared to consent to the use of the transcript, predominately because such a process did not accord with the principles of natural justice given the dangers surrounding the admittance of hearsay evidence – The Board found that a reading of sections 111(2)(e) of the Act and s. 15(1) of the *Statutory Powers Procedure Act* clearly indicated that the authority to admit hearsay evidence such as the transcripts is within its power – On analysis as to whether the transcripts ought to be admitted, the Board indicated that the relevancy, reliability, unfairness and any violations of natural justice should provide the basis upon which it should determine whether to accept or reject hearsay evidence – Ultimately, the Board found that the provision of an opportunity for WUOC to cross-examine witnesses on their adoption of the prior statements under the observation of the Vice-Chair effectively ensured that there was no unfairness or violation of natural justice arising from the dangers associated with admitting hearsay evidence – Accordingly, the transcripts were admitted as evidence – Matter continues

UNITE HERE; RE WORKERS UNITED ONTARIO COUNCIL AND ARAMARK CANADA LTD..(Jul./Aug.) 568

Final Offer Vote – First Contract Arbitration – Ministerial Reference – The employer requested that the Minister direct a final offer vote – Prior to the scheduled vote, the Board issued a decision directing the settlement of the first collective agreement by arbitration – The Minister subsequently referred a question to the Board regarding whether he is required to direct that the final offer vote be taken in light of the Board's order for first contract arbitration – The Board held that a request for a final offer vote is understood as a continuing request until the time the vote is held – The Board found that the statutory precondition of the possibility of a strike or lock-out does not continue to exist once a direction for first contract arbitration is made – Accordingly, the right to a final offer vote is extinguished when a direction for first contract arbitration is made – There is no basis upon which the Minister could continue to direct a vote on the employer's final offer

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793..(May/June) 438

First Contract Arbitration – Construction Industry – Practice and Procedure – Reconsideration – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 .... (Jan./Feb.) 20

First Contract Arbitration – Final Offer Vote – Ministerial Reference – The employer requested that the Minister direct a final offer vote – Prior to the scheduled vote, the Board issued a decision directing the settlement of the first collective agreement by arbitration – The Minister subsequently referred a question to the Board regarding whether he is required to direct that the final offer vote be taken in light of the Board's order for first contract arbitration – The Board held that a request for a final offer vote is understood as a continuing request until the time the vote is held – The Board found that the statutory precondition of the possibility of a strike or lock-out does not continue to exist once a direction for first contract arbitration is made – Accordingly, the right to a final offer vote is extinguished when a direction for first contract arbitration is made – There is no basis upon which the Minister could continue to direct a vote on the employer's final offer

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 .... (May/June) 438

Freedom of Information and Protection of Privacy Act – Unfair Labour Practice – The union sought disclosure of a document ("Notice of Decision") detailing the results of the employer's investigation of complaints made between two union members pursuant to the employer's policy regarding harassment complaints – The issue before the Board was whether or not the mandatory limitation on the disclosure of personal information under the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") prevented the Board from issuing an order requiring the employer to disclose the Notice of Decision to the union – The Board found that *FIPPA* did not prevent disclosure of the Notice of Decision as it fell within the labour relations exception under section 65(6) and accordingly *FIPPA* had no application – In addition, after reviewing *FIPPA* section 21(1) the Board found that to the extent that disclosure of the Notice of Decision to the union involved any invasion of personal privacy, it was not an unjustified invasion – Matter continues

LAURENTIAN UNIVERSITY; RE LAURENTIAN UNIVERSITY FACULTY ASSOCIATION .... (May/June) 405

Grievance – Collective Agreement – Construction Industry – This referral by Otis of a grievance centred around two elevator mechanics from IUEC Local 102, which is based out of Winnipeg, performing work in Terrace Bay, Ontario – The issue was what wage rate the Local 102 members were entitled to: their local wage rate, or the higher Toronto wage rate – A survey of the evolution of the collective agreement and associated letters of understanding revealed that any members working in areas other than their local area, at the request of their employer, would receive their local wage rate or the wage rate of the area they were working in, whichever was higher – Local 102 acknowledged that the collective agreement language on its face restricted the application of the Toronto wage rate to the City of Thunder Bay – The union submitted that the language of the collective agreement did not reflect the negotiation of the parties that the wage rate set for the City of Thunder Bay also would include the surrounding Northern areas – Local 102 asked the Board to rectify the collective agreement to reflect an error in the language used – The Board reviewed the criteria for rectification and determined there was no clear and easily fixable error in the collective agreement, as the parties significantly disagreed on what had been agreed to in negotiations – Consequently, the test for granting rectification laid out in *Nav Canada* was not met – The Board concluded there was no wage rate established for Terrace Bay and the Local 102 members were therefore entitled to their home wage rate – Grievance allowed

OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 102..........(Jul./Aug.) 499

Health and Safety – Trade Union – *Trades Qualification and Apprenticeship Act* – PCL filed an application under the OHSA to appeal orders against them – The Labourers, Local 247 intervened in support of PCL; the Sheet Metal Workers and the UA, Local 221 intervened in support of the inspector and his orders – Part of major redevelopment work by Kingston General Hospital (KGH) involved the removal and replacement of selected portions of existing HVAC systems by subcontracted Envirocon employees – An Inspector visited the areas at the KGH where Envirocon's construction labourers were performing work on the HVAC system – The site visit resulted in the Inspector issuing four orders, which all turned on the main issue in dispute: whether or not the "handling and dismantling of sheet metal" work performed by the Labourers was in fact sheet metal work as defined under Regulation 1077 of the TQAA and, therefore, within the meaning of OHSA Regulation 572/99 – Regulation 572/99 of the OHSA is designed to promote health and safety by ensuring workers have the proper and appropriate training achieved by directly incorporating regulations passed under the TQAA – The Board found that the work in question did not call for the specialised and exclusive training which sheet metal workers receive, and was therefore not the "handling and dismantling of sheet metal" within the meaning of Regulation 1077 – Accordingly, the provisions of 572/99 did not require that such work be performed exclusively by sheet metal workers – Inspector's Orders set aside

PCL CONSTRUCTORS CANADA INC.; LIUNA, LOCAL 247, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 269; ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE, AND KEVIN KEALEY, INSPECTOR..........(Jul./Aug.) 510

Health and Safety – An order was issued requiring Xstrata to have the first aid rooms located at each of two of the employer's mines in the charge of two different first aid attendants – The Board, differently constituted, dismissed Xstrata's application to suspend the operation of the Order pending disposition of this appeal – The Board found that the regulation used the term "readily available" not "immediately available" and there was nothing in the regulation precluding an employer from having two first aid rooms associated with two underground mines in the charge of the same individual when it is unlikely that first aid attendant will be required to administer first aid at the same time in two locations – The Board found that because the mines are not in production and there were relatively few employees working underground, it was unlikely that simultaneous first aid would be required at different mines – The Board found that while the mines remain out of production, Xstrata is in accord with the regulation by having the two first aid rooms in the charge of the same qualified first aid attendant – Appeal allowed; Order rescinded

XSTRATA CANADA CORPORATION; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), LOCAL 2020; RE RICK KULYSKI, INSPECTOR; AND CANADIAN AUTOWORKERS (CAW) CANADA AND ITS LOCAL 598 ....(Jan./Feb.) 199

Health and Safety – Construction Industry – Jurisdictional Dispute – *Trades Qualification and Apprenticeship Act* – The UA called the Health and Safety Inspector to seek a ruling to determine whether or not the work performed by Carpenters could only be done by a person who was licensed as a journeyman or apprentice plumber – The Inspector's Order required the work to be performed by plumbers – The Carpenters seek to have the Board suspend the Order pending the appeal – The Board applied its standard three part test to determine whether a suspension of the Order was appropriate – The first and third element of the test converge as the Regulations of the TQAA specify what training is required for specific trades, and the Board will likely find it unsafe for any person without such training to perform the work – The issue was simplified to an application of the work to the TQAA and Carpenters' and Plumbers' Regulations suggesting that the dispute was entirely a jurisdictional one and not a question of worker safety – Therefore a strong case for a successful appeal existed – Worker safety will not be affected by suspending the Order – There was prejudice to the employer if the Order was not suspended as the UA was seeking to disrupt the commercial arrangements between the employer and contractor – Order suspended until the appeal is determined

ACTION GROUP INC., AND DAN DIGNARD, INSPECTOR; RE UBCJA, LOCAL 1946; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 593 ....(Mar./Apr.) 223

Health and Safety – Delay – Duty of Fair Representation – Judicial Review – Settlement – The applicant sought review of two Board decisions, one dismissing a s. 74 complaint, and the second dismissing a s. 50 OHSA application in favour of an ongoing proceeding before the Grievance Settlement Board – The matter was settled at the GSB, and the applicant asked the Court to set aside the Minutes of Settlement (MOS) – The Court found there was no evidence of the applicant's diminished capacity during the GSB proceeding, so the MOS was fatal to his claim – In addition the MOS was not a reviewable decision – The applications for review of the Board rulings were dismissed for delay

DONALD AMODEO; RE ONTARIO MINISTRY OF LABOUR (HER MAJESTY IN RIGHT OF ONTARIO), ATTORNEY GENERAL OF ONTARIO, GRIEVANCE SETTLEMENT BOARD, OPSEU AND OLRB ....(Mar./Apr.) 360

Health and Safety – Employee – Employer – These applications concern the health and safety of paramedics (employees of Essex represented by CUPE) in relation to communications systems which the MOHLTC has the sole and exclusive responsibility to provide and operate – There were six issues over which Essex and CUPE disagreed with the MOHLTC: the need for a second portable radio on an ambulance crew so that both crew members would have a portable radio; testing emergency buttons on the radios; preventative maintenance of the radios; flagging of potentially dangerous addresses; mike to mike functions on cell phones; and information on defects in the system – The Board reviewed the factual context, the hazards faced by paramedics, and the MOHLTC's role with respect to the provision of ambulance services in Essex – The Board found that while MOHLTC was not the employer of the paramedics, it did have some of the obligations of an employer under the OHSA to the paramedics – The Board found a high level of integration between the communications and dispatch functions performed by the MOHLTC and the service functions performed by Essex – The Board noted that the paramedics were under the constant direction and control of [MOHLTC's] Central Ambulance Communication Centre from the beginning to the end of their shifts – After an extensive review of the case law, the Board found the integration of these systems was sufficient to impose upon the MOHLTC some of the obligations of an employer in relation to the paramedics–given that the contiguous sphere of operations with Essex meant that MOHLTC's activities could pose a risk of harm to the paramedics – Alternatively the Board found the MOHLTC, although a non-natural person, could be a supervisor under the Act, and given the authority (complete and exclusive control over the communications system it requires the paramedics to use) it exercised over the paramedics, it was their supervisor – The Board went on to find that the MOHLTC did breach certain obligations with respect to the six issues as an employer (and alternatively as a supervisor) in relation to the paramedics with respect to the communications systems – Declarations, orders and directions made

MINISTRY OF HEALTH AND LONG-TERM CARE, LAND AMBULANCE PROGRAMS; RE CUPE LOCAL 2974.1 AND R. TAGGART, INSPECTOR; RE COUNTY OF ESSEX-WINDSOR..(Jan./Feb.) 108

Health and Safety – Interim Relief – The College and two of its unions were unable to come to agreement on the timely and appropriate statutory inspections of the workplace, which occupies approximately 100 acres of land and consists of almost 1,900 rooms or spaces – The Inspector ordered that the physical condition of the workplace be inspected once a month – The College appealed and sought a suspension of the order, asserting that the parties enjoyed a long history of regular and compliant inspections until the end of the last agreement – The Board held that a suspension of the order would not relieve the College of its obligations under the Act; there was no evidence to suggest that a suspension of the order would put employees at risk; a failure to suspend the order would considerably prejudice the employer; and the employer had pleaded a strong *prima facie* case for success on the merits of the appeal – However, the Board concluded although it could suspend the order under appeal, it had no jurisdiction to substitute a second order in the context of a suspension request - After consulting with the parties, the Board issued an interim order directing the parties to conduct inspections in accordance with a proposal proffered by the College – Suspension granted, appeal to be heard

FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE OPSEU, LOCAL 109, OPSEU, LOCAL 110 AND CHRISTOPHER CALAGHAN, INSPECTOR..(Jan./Feb.) 35

Health and Safety – Judicial Review – Lennox Drum Limited (Lennox) appealed an order requiring it to comply with the Industrial Regulation relating to proper stacking of drums – Lennox argued that its method of stacking two tiers of empty drums met the equivalency criteria set out in section 2 of the Regulation – The Board found that the Lennox method did not comply with the Regulation: to simply ignore the provision was not a variance – Lennox applied for judicial review – The appropriate standard of review was reasonableness – The Divisional Court found that the Board's decision was not only reasonable, but correct – Application dismissed

LENNOX DRUM LIMITED; RE JOSEPH AH-HONE, INDUSTRIAL HEALTH AND SAFETY INSPECTOR AND JOSEPH OUIMET, WORKER MEMBER OF THE LENNOX DRUM LIMITED JOINT HEALTH AND SAFETY COMMITTEE AND THE OLRB ....(Jul./Aug.) 581

Health and Safety – Local 1946 sought a suspension of an order requiring electricians to mount bed locators in hospital rooms at the Victoria Hospital construction project – The Board found that it was more probable than not that the bed locator would be a metal frame fixture containing smaller electrical fixtures and raceways; it was not an electrical fixture within the meaning of the *Trades Qualification and Apprenticeship Act* – Given that, the Board found that Local 1946 demonstrated that it had a strong *prima facie* case for a successful appeal – Local 1946 also established that suspending the order was not likely to create a danger to the health and safety of workers and that it would be prejudiced if the order were not suspended – Since Local 1946 was able to satisfy all three criteria for a suspension of the order, the request was granted pending the disposition of the appeal

ELLISDON CORPORATION; DAN DIGNARD, INSPECTOR; AND IBEW, LOCAL 120; RE UBCJA, LOCAL 1946 .... (Mar./Apr.) 262

Health and Safety – Reconsideration – The Board allowed an appeal of the Inspector's order ([2010] OLRB Rep. Jan/Feb 199) and both the Union and the Ministry of Labour applied for reconsideration – The Union submitted that the underlying factual basis for the Board's decision had changed significantly since the employer had decided to reopen one of the mines which was only on care and maintenance – The Board found that the evidence that the Union sought to put before the Board related to developments that occurred or will take place after the order under appeal was issued, and were accordingly irrelevant and would not be considered by the Board – The Board went on to note that the dismissal of the appeal and denial of the reconsideration did not preclude an inspector conducting another investigation and making a determination with respect to the employer's compliance with the Regulations based on the facts that exist when the investigation takes place – Reconsideration denied

XSTRATA CANADA CORPORATION; RE UNITED STEELWORKERS, LOCAL 2020; RICK KULYSKI, INSPECTOR; AND CAW CANADA AND ITS LOCAL 598 .... (Mar./Apr.) 354

Health and Safety – The employer challenged the propriety of an order requiring it to ensure that workers are protected from falling during the offloading of flatbed trailers – The Inspector issued the order under a section of the Regulation that deals with material handling rather than fall protection – The Board found that the risk identified by the Inspector had nothing to do with *what* the workers were doing, and had everything to do with *where* they were doing it – The elevation of the workers securing the loads on the flatbed trailers (approx 1.5 metres) did not meet the minimum to be captured by the fall protection provisions (3 metres) – The Board held that the Inspector's order imposed a more stringent standard on the Employer than the actual standard in the regulation designed to address the specific hazard – Appeal allowed; order rescinded

NATIONAL STEEL CAR; RE UNITED STEEL WORKERS OF AMERICA, LOCAL 7135 AND JOHN PIERROZ, INSPECTOR ....(Jan./Feb.) 165

Health and Safety – The Toronto Police Association appealed an inspector's decision that the Toronto Police Services Board had not failed to take every precaution reasonable in the circumstances through the implementation of TPSB's mandatory name tag policy for members, while in uniform – The TPA argued there was an increased risk of psychological and physical harm due to today's electronic environment availability where this information can lead to access to addresses, telephone numbers and other personal information – On reviewing the history of the issue, the legal framework, other ways officers' names become known to the public, and specific incidents, among other matters, the Board determined whether the TPSB had taken every precaution reasonable in the circumstances, given the particular circumstances of the TPS which includes the fact that policing is an inherently dangerous profession; that during the course of their duties officer's names become known to members of the public in a myriad of ways apart from name tags; and that the presence of name tags has not increased the risk of harm to officers from organized crime; and that neither the frequency nor severity of threats from mentally ill persons has increased as a result of the use of name tags – Given that the evidence did not establish that the wearing of name tags was related to any material increase in risk, the Board dismissed the appeal – Appeal dismissed

TORONTO POLICE SERVICES BOARD AND CHRISTOPHER LYNCH, INSPECTOR; RE TORONTO POLICE ASSOCIATION ....(Nov./Dec.) 940

Hospital Labour Disputes Arbitration Act – Reference – Trade Union – The question referred to the Board on a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (HLDAA) was whether or not bargaining unit employees are covered by HLDAA – CUPE took the position that HLDAA applied while Rothwell opposed this view – The advice provided by the Board was that the bargaining unit employees of this employer are not covered by HLDAA – Rothwell is not an enumerated institution under the definition of "hospital" in HLDAA because its employees primarily provide cleaning, and not personal care services – The Board found that the health, safety or well-being of the residents would not be jeopardized by a strike and that Rothwell was not an institution operated for the "care, observation or treatment" of those clients within the meaning of section 3(2) of HLDAA – Advice provided

ROTHWELL HEIGHTS LODGE; CUPE AND ITS LOCAL 3317...................(Jul./Aug.) 533

Human Rights Code – Construction Industry Grievance – Estoppel – The grievance arose from the lay-off of a journeyman electrician over the age of 50 where the Principal Agreement required one in every five journeymen to be "fifty (50) years of age or older, where available" – The Board found that the respondent was not estopped from asserting the section was illegal because the respondent raised the issue in bargaining and rather than taking the issue any further, the parties simply agreed to disagree over whether it was contrary to the Code – The Board found the section required an employer to discriminate among employees with respect to their employment by reason of their age –The Board would not take administrative notice, nor was it persuaded on the evidence, that electricians aged 50 and older constituted a disadvantaged group – The Board concluded that the section at issue did not constitute a special program within the meaning of the *Code* as it found no "rational connection between any restrictions in eligibility and the purpose of the special program itself" – Accordingly, the respondent was not found to have violated the Principal Agreement – Grievance dismissed

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 353; RE THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS CONSTRUCTION COUNCIL OF ONTARIO ... (Sept./Oct.) 583

Interference in Trade Unions – Certification Where Act Contravened – Construction Industry – Intimidation and Coercion – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 1

Interference with Trade Union – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant

privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD .... (Jan./Feb.) 92

Interference with Trade Unions – Certification Where Act Contravened – Construction Industry – Remedies – Unfair Labour Practice – The Carpenters commenced an organizing campaign by having an employee of Southend distribute cards – The owner's brother, who was the employee's supervisor, openly expressed his dislike of unions, and burned another employee's union card at the workplace, in front of several other employees – The employer argued that the discharge of the employee who began distributing cards was for excessive absences, and for drinking during lunch – The Board found that the termination of the employee effectively put an end to the organizing campaign – The Board preferred the discharged employee's evidence over that of the employer's witnesses – Although his attendance may have been at issue, it was not the reason for the discharge – Other employees were reprimanded for drinking at lunch; the inside organizer was terminated – The employer did nothing to distance himself from his brother's anti-union behaviour – The Board was satisfied that a representation vote would not reflect the true wishes of employees – Certificate granted

SOUTHEND DRYWALL & ACOUSTICS LTD.; RE UBCJA, LOCAL 2486 .... (Mar./Apr.) 317

Interim Order – Certification – ETFO applied to represent a bargaining unit of designated early childhood educators – CUPE intervened in the application, asserting that it represented the DECEs in an all employee unit covered by a subsisting collective agreement – The status of the DECEs was the subject of an on-going grievance between CUPE and the school board in which the arbitrator had denied ETFO status to intervene – The issue for the Board was whether it should determine if the employees affected by the application for certification are covered by a collective agreement, or if an arbitrator should make that decision – ETFO asked for an interim order that would have the Board ask CUPE and the school board to adjourn their grievance pending the outcome of the application for certification – The Board held that its jurisdiction to determine the issue was parallel to the arbitrator's, with neither being superior to the other; the Board is not bound by any arbitration award – A proceeding before the Board best protects the natural justice rights of all the parties, including the employees, so the Board chose not to defer to arbitration – Interim ordered dismissed; matter continues

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE .... (Nov./Dec.) 743

Interim Relief – Health and Safety – The College and two of its unions were unable to come to agreement on the timely and appropriate statutory inspections of the workplace, which

occupies approximately 100 acres of land and consists of almost 1,900 rooms or spaces – The Inspector ordered that the physical condition of the workplace be inspected once a month - The College appealed and sought a suspension of the order, asserting that the parties enjoyed a long history of regular and compliant inspections until the end of the last agreement – The Board held that a suspension of the order would not relieve the College of its obligations under the Act; there was no evidence to suggest that a suspension of the order would put employees at risk; a failure to suspend the order would considerably prejudice the employer; and the employer had pleaded a strong *prima facie* case for success on the merits of the appeal – However, the Board concluded although it could suspend the order under appeal, it had no jurisdiction to substitute a second order in the context of a suspension request - After consulting with the parties, the Board issued an interim order directing the parties to conduct inspections in accordance with a proposal proffered by the College – Suspension granted, appeal to be heard

FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE OPSEU, LOCAL 109, OPSEU, LOCAL 110 AND CHRISTOPHER CALAGHAN, INSPECTOR...(Jan./Feb.) 35

Interim Relief – Certification – Discharge – Unfair Labour Practice – The union applied for interim reinstatement of the worker contending he was terminated for his involvement in the organizing drive – The evidence showed that prior to his termination the union had signed up five members (in a 65 member bargaining unit) and after his termination the union signed up an additional 37 members and filed for certification – As the worker's termination did not stall the organizing drive (indeed it seemed to propel it), the Board found that interim relief was not necessary to prevent irreparable harm nor was it necessary to achieve other significant labour relations objectives – Accordingly all of the conditions under s. 98(2) were not met – Application dismissed

NOVOTEL CANADA INC., ACCOR CANADA INC., NOVOTEL OTTAWA; RE HOSPITALITY & SERVICE TRADE UNION, LOCAL 261 AND JEFFREY SEGAT ....(Mar./Apr.) 287

Interim Relief – Construction Industry – Intervenor – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC..(Jan./Feb.) 173

Interim Relief – Construction Industry – Unfair Labour Practice – During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C., AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD............(Jan./Feb.) 85

Interim Relief – Discharge for Union Activity – Practice and Procedure – The SEIU sought an interim order for reinstatement of a probationary employee – A decision had been made by the employee's supervisor that she was not suitable for permanent employment – This decision was not communicated to the employee because she had requested a leave of absence to complete a professional examination – Upon her return, the employee learned of the organizing campaign and began showing her support – She was terminated five days later – SEIU alleged that the discharge effectively halted the union's organizing efforts – Princess Gardens conceded that a campaign to establish bargaining rights was underway and that there was a serious issue to be decided in the pending proceeding – The Board did not find it necessary to determine whether relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives or whether the balance of harm favoured the granting of the interim relief, because it appeared to the Board that the dismissal was unrelated to the exercise of the employee's rights in support of the union – The Board found that Princess Gardens had a plausible basis for ending the employee's employment and its explanation for the delay in informing her of the dismissal was also plausible – The Board found on a preliminary assessment that the discharge was unrelated to the exercise of rights under the Act by an employee and therefore the Board was prevented from exercising its discretion to reinstate – Application for interim relief dismissed

PRINCESS GARDENS RETIREMENT RESIDENCE; RE SEIU, LOCAL 1 CANADA..(Mar./Apr.) 309

Interim Relief – Discharge for Union Activity – Unfair Labour Practice – The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union – The four criteria under s. 98(2) having been met, the Board ordered interim reinstatement – Interim Relief granted

SOBEYS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A ....(Nov./Dec.) 825

Interim Relief – Unfair Labour Practice – The employer laid off a number of employees during a CAW organizing campaign – The CAW filed an unfair labour practice complaint and an interim relief application alleging that the lay-offs were motivated by anti-union animus, animated particularly by the inclusion of three employees who were supporters of the union – The employer reinstated the employees and the CAW withdrew its application for interim reinstatement – The CAW then filed an application for certification but withdrew the application two days later – There were then additional lay-offs including the three employees who were supporters of the union – The CAW filed an application to have the employees reinstated to their positions – In assessing whether a campaign to establish bargaining rights was underway the Board found that there was sufficient evidence to conclude that the organizing drive continued after the CAW withdrew its application – The fact that the CAW withdrew its application for certification did not mean that its campaign to establish bargaining rights was no longer underway – In assessing whether all of the conditions under s. 98(2) were met the Board held that on a balance of probabilities it narrowly appeared that the lay-offs were unrelated to the exercise of rights under the Act – There was evidence that the employees had been selected for possible lay-off prior to the CAW organizing campaign – Application for interim relief dismissed

MJ MANUFACTURING – A DIVISION OF MARTINREA INTERNATIONAL INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) ....(May/June) 419

Intervenor – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board

permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA..(Nov./Dec.) 751

Intervenor – Jurisdictional Dispute – The Millwrights brought two applications in response to grievances filed by the Plumbers – EPSCA intervened in both applications, which relate to the same work in dispute performed at the same worksite – During mark-up meetings required by the collective agreement, to which all parties were bound, the work in dispute was assigned to the Millwrights; however, the work was done by the Plumbers – Both employers state that they did not change the work assignment and when they became aware that the Plumbers had done the work they directed that the work be performed by the Millwrights – The Plumbers argued that the work was finally assigned to them and that the Millwrights had the onus of demonstrating that the work assigned to the Plumbers should be altered – The Board stated that it would not support efforts by parties to gain advantage by avoiding or ignoring the transparent processes contained in the EPSCA collective agreements – The Board held that the fact that the union to whom the work was not assigned did the work does not mean that there was a change made to the assignment – The Plumbers' challenge to the assignment of work in dispute came almost a year after they were aware of the assignment – As a result, the Board found it was not necessary to inquire further into the assignments of work – The Board exercised its discretion and was not prepared to consider the Plumbers' claim to the work in dispute – The assignments were not challenged in a timely manner – Board declares the work in dispute was properly assigned to the Millwrights

AKER KVAERNER SONGER CANADA, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 67 AND; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1007; RE; EPSCA..(Jan./Feb.) 30

Intervenor – Construction Industry – Interim Relief – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC..(Jan./Feb.) 173

Intimidation and Coercion – Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 1

Judicial Review – Bargaining unit – Certification – Employee – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

RAINBOW CONCRETE INSDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 218

Judicial Review – Construction Industry Grievance – Delay – The Sheet Metal Workers and the IBEW sought judicial review of two Board decisions which found that a 1965 Working Agreement signed by Ellis Don did not confer bargaining rights on the unions and was not a recognition agreement – The IBEW also sought to challenge one of the Board decisions for delay – The Court found the Board's decision-making process in each case was transparent, intelligible and justifiable – On the issue of the two-year delay in issuing a decision, the Court held that the union failed to show any prejudice, and was unable to rebut the presumption of regularity of the Board's proceedings – Applications dismissed

ELLIS-DON LIMITED, ELLIS DON CORPORATION AND OLRB; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE..................(Nov./Dec.) 1016

Judicial Review – Construction Industry Grievance – The union sought review of the Board's interpretation of the term "working conditions" in the collective agreement – The Board found that the employer's requirement that workers wear metatarsal safety boots were an enhanced safety policy and not an "exceptional" working condition – The Court held that the Board's contextual approach to its interpretation of the collective agreement was reasonable – Application dismissed

AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC. AND OLRB; RE IBEW LOCAL 105..(Nov./Dec.) 1010

Judicial Review – Delay – Duty of Fair Representation – Health and Safety – Settlement – The applicant sought review of two Board decisions, one dismissing a s. 74 complaint, and the second dismissing a s. 50 OHSA application in favour of an ongoing proceeding before the Grievance Settlement Board – The matter was settled at the GSB, and the applicant asked the Court to set aside the Minutes of Settlement (MOS) – The Court found there was no evidence of the applicant's diminished capacity during the GSB proceeding, so the MOS was fatal to his claim – In addition the MOS was not a reviewable decision – The applications for review of the Board rulings were dismissed for delay

DONALD AMODEO; RE ONTARIO MINISTRY OF LABOUR (HER MAJESTY IN RIGHT OF ONTARIO), ATTORNEY GENERAL OF ONTARIO, GRIEVANCE SETTLEMENT BOARD, OPSEU AND OLRB ....(Mar./Apr.) 360

Judicial Review – Health and Safety – Lennox Drum Limited (Lennox) appealed an order requiring it to comply with the Industrial Regulation relating to proper stacking of drums – Lennox argued that its method of stacking two tiers of empty drums met the equivalency criteria set out in section 2 of the Regulation – The Board found that the Lennox method did not comply with the Regulation: to simply ignore the provision was not a variance – Lennox applied for judicial review – The appropriate standard of review was reasonableness – The Divisional Court found that the Board's decision was not only reasonable, but correct – Application dismissed

LENNOX DRUM LIMITED; RE JOSEPH AH-HONE, INDUSTRIAL HEALTH AND SAFETY INSPECTOR AND JOSEPH OUIMET, WORKER MEMBER OF THE LENNOX DRUM LIMITED JOINT HEALTH AND SAFETY COMMITTEE AND THE OLRB ....(Jul./Aug.) 581

Judicial Review – Natural Justice – Stay – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed

MARK CORNER; RE ONTARIO (MINISTER OF LABOUR); OLRB; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RAINBOW CONCRETE INDUSTRIES LIMITED...(Nov./Dec.) 1011

Jurisdictional Dispute – Construction Industry – Health and Safety – *Trades Qualification and Apprenticeship Act* – The UA called the Health and Safety Inspector to seek a ruling to determine whether or not the work performed by Carpenters could only be done by a person who was licensed as a journeyman or apprentice plumber – The Inspector's Order required the work to be performed by plumbers – The Carpenters seek to have the Board suspend the Order pending the appeal – The Board applied its standard three part test to determine whether a suspension of the Order was appropriate – The first and third element of the test converge as the Regulations of the TQAA specify what training is required for specific trades, and the Board will likely find it unsafe for any person without such training to perform the work – The issue was simplified to an application of the work to the TQAA and Carpenters' and Plumbers' Regulations suggesting that the dispute was entirely a jurisdictional one and not a question of worker safety – Therefore a strong case for a successful appeal existed – Worker safety will not be affected by suspending the Order – There was prejudice to the employer if the Order was not suspended as the UA was seeking to disrupt the commercial arrangements between the employer and contractor – Order suspended until the appeal is determined

ACTION GROUP INC., AND DAN DIGNARD, INSPECTOR; RE UBCJA, LOCAL 1946; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 593 ....(Mar./Apr.) 223

Jurisdictional Dispute – Construction Industry – PCL subcontracted the work in dispute, the forming of walls by insulated concrete formwork (ICF), which is a relatively new building method or technology, to Elite, a subcontractor bound to a collective agreement with the Carpenters – The applicant Locals asserted that the work in dispute represented their respective traditional portion of concrete formwork in the ICI sector of the construction industry, while the responding parties asserted that virtually every aspect of the ICF construction differed from traditional concrete formwork – The Board found that the forming process reflected by ICF technology was not so markedly different than that reflected by traditional concrete forming that the wholesale rejection of area practice evidence with respect to the installation of traditional concrete forms was warranted – Accordingly, the Board found it appropriate to consider the area practice relied upon by the applicant Locals and found it overwhelmingly supported the assignment of work in dispute to the applicants – The totality of the evidence of employer practice also suggested that the applicants had a better claim to the assignment of work than did the Carpenters – After finding the other factors at best neutral, the Board was satisfied that there were compelling reasons to find in favour of the applicants notwithstanding the absence of a collective agreement relationship between each of them and Elite – The Board found the work in dispute ought to have been assigned to the applicants members

PCL CONSTRUCTORS CANADA LTD. AND ELITE BUILDING GROUP INC.; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736 .... (Sept./Oct.) 672

Jurisdictional Dispute – Construction Industry – Work in this dispute consisted of carpentry portions of concrete forming work for footings, retaining walls and planter boxes located outside of the building structure at the North Bay Regional Health Centre Project – The general contractor on the project, PCL was bound to both the Carpenters' and the Labourers' ICI agreements – PCL subcontracted certain concrete forming work to Downsview, which was not bound to the Carpenters' ICI agreement – Downsview assigned the concrete forming work to the Labourers – The Carpenters filed a grievance against PCL for violating the subcontracting clause of the ICI agreement – In response, the Labourers filed a jurisdictional dispute – A primary issue was whether the work in dispute fell within the ICI sector or in the roads sector of the construction industry – Considering the usual factors in sector disputes, the Board found that the work in dispute was work that fell within the ICI sector – The Board then proceeded to determine the merits of the jurisdictional dispute and found that the work in dispute ought to have been assigned to the Carpenters rather than to the Labourers – It was ICI work and the Carpenters had a collective agreement covering the work in dispute while the Labourers did not – The area practice evidence favoured the assignment of the work to the Carpenters – The employer practice evidence filed by the Labourers, PCL and Downsview was not persuasive and the economic and efficiency evidence favouring the Labourers was not sufficient enough to dislodge the significance of the collective agreement obligations owed to the Carpenters – Application allowed

PCL CONSTRUCTORS CANADA INC., THE DOWNSVIEW GROUP, GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, LOCAL 2486, AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA, LOCAL 493 AND UNIVERSAL WORKERS' UNION, LIUNA, LOCAL 183 .... (Nov./Dec.) 771

Jurisdictional Dispute – Intervenor – The Millwrights brought two applications in response to grievances filed by the Plumbers – EPSCA intervened in both applications, which relate to the same work in dispute performed at the same worksite – During mark-up meetings required by the collective agreement, to which all parties were bound, the work in dispute was assigned to the Millwrights; however, the work was done by the Plumbers – Both employers state that they did not change the work assignment and when they became aware that the Plumbers had done the work they directed that the work be performed by the Millwrights – The Plumbers argued that the work was finally assigned to them and that the Millwrights had the onus of demonstrating that the work assigned to the Plumbers should be altered – The Board stated that it would not support efforts by parties to gain advantage by avoiding or ignoring the transparent processes contained in the EPSCA collective agreements – The Board held that the fact that the union to whom the work was not assigned did the work does not mean that there was a change made to the assignment – The Plumbers' challenge to the assignment of work in dispute came almost a year after they were aware of the assignment – As a result, the Board found it was not necessary to inquire further into the assignments of work – The Board exercised its discretion and was not prepared to consider the Plumbers' claim to the work in dispute – The assignments were not challenged in a timely manner – Board declares the work in dispute was properly assigned to the Millwrights

AKER KVAERNER SONGER CANADA, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 67 AND; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1007; RE; EPSCA..(Jan./Feb.) 30

Membership Evidence – Certification – Practice and Procedure – The union filed membership evidence that was undated – The Board found that undated membership cards is not evidence that the Board can rely on in deciding whether to order a representation vote – The Board noted that Rule 9.2 requires that membership evidence must disclose the date upon which each signature was obtained – Further the Board found it was unlikely that it could rely upon affidavit evidence to provide the dates the cards were signed, given s. 8(3) prevents the Board from considering the affidavit and it would defeat the quick vote scheme of the Act – Finally, given the large number of undated cards this would not be an appropriate case, in any event, to relieve against the Board's rules – Application dismissed

STOCK TRANSPORTATION LTD.; RE AMALGAMATED TRANSIT UNION LOCAL 1573..(May/June) 442

Ministerial Reference – Final Offer Vote – First Contract Arbitration – The employer requested that the Minister direct a final offer vote – Prior to the scheduled vote, the Board issued a decision directing the settlement of the first collective agreement by arbitration – The Minister subsequently referred a question to the Board regarding whether he is required to direct that the final offer vote be taken in light of the Board's order for first contract arbitration – The Board held that a request for a final offer vote is understood as a continuing request until the time the vote is held – The Board found that the statutory precondition of the possibility of a strike or lock-out does not continue to exist once a direction for first contract arbitration is made – Accordingly, the right to a final offer vote is extinguished when a direction for first contract arbitration is made – There is no basis upon which the Minister could continue to direct a vote on the employer's final offer

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793..(May/June) 438

Natural Justice – Certification – Displacement – Practice and Procedure – Representation Vote – Trade Union – In a displacement application for certification, Workers United Ontario Council (WUOC), the losing trade union in a close vote, raised an issue concerning the conduct of the representation vote – The vote consisted of two one-hour polls, one in the morning, the other in the evening – During the first fifteen minutes of the evening poll, the building doors were locked barring access to potential voters – Inquiries made by WUOC did not indicate that any individual was prevented from voting due to lack of access – WUOC requested another vote which UNITE HERE opposed – The Board followed the principle that "when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election" – The Board found that voters are entitled to a high standard of integrity, but not perfection in the conduct of representation votes – The Board concluded that there was no evidence the error prevented anyone from voting, and declined to disregard the outcome of the balloting – Matter continues

NORDIC GAMING CORPORATION; RE WORKERS UNITED ONTARIO COUNCIL; RE UNITE HERE ....(Jul./Aug.) 495

Natural Justice – Certification – Related Employer/Sale of Business – Practice and Procedure – Reconsideration – Termination – Subsequent to the filing of a 69/1(4) application the UFCW and responding employers settled the matter in a way that affected employees in locations other than those which had received notice of the original applications – Neither the parties nor the Board ensured that these additional employees received notice of the Board's decision, reflecting the parties' settlement, which affected their rights – Given a timely objection by employees from one of the stores for which notice was not provided, the Board varied its decision to exclude the store from the bargaining unit descriptions contained in its earlier decision – Termination application dismissed – Certification continues

PHARMA PLUS DRUGMARTS LTD., KATZ GROUP CANADA LTD. AND PHARMX REXALL STORES LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 414 ....(May/June) 436

Natural Justice – Evidence – Practice and Procedure – Trade Union – UNITE HERE brought a motion to admit the transcripts taken by a court reporter during eleven hearing days presided over by the Chair, who was appointed a Judge of the Superior Court of Justice of Ontario, and as a result was unable to continue to hear and determine these proceedings – UNITE HERE had been granted permission to have a court reporter create transcripts of the evidence with the usual understanding that the transcripts must be shared with the other parties and the Board and were not an official record – At a reconstituted hearing before a different Vice-Chair, the use of these transcripts for the purpose of expediting the proceedings was explored – Workers United Ontario Council (WUOC) indicated that it was not prepared to consent to the use of the transcript, predominately because such a process did not accord with the principles of natural justice given the dangers surrounding the admittance of hearsay evidence – The Board found that a reading of sections 111(2)(e) of the Act and s. 15(1) of the *Statutory Powers Procedure Act* clearly indicated that the authority to admit hearsay evidence such as the transcripts is within its power – On analysis as to whether the transcripts ought to be admitted, the Board indicated that the relevancy, reliability, unfairness and any violations of natural justice should provide the basis upon which it should determine whether to accept or reject hearsay evidence – Ultimately, the Board found that the provision of an opportunity for WUOC to cross-examine witnesses on their adoption of the prior statements under the observation of the Vice-Chair effectively ensured that there was no unfairness or violation of natural justice arising from the dangers associated with admitting hearsay evidence – Accordingly, the transcripts were admitted as evidence – Matter continues

UNITE HERE; RE WORKERS UNITED ONTARIO COUNCIL AND ARAMARK CANADA LTD..(Jul./Aug.) 568

Natural Justice – Judicial Review – Stay – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed

MARK CORNER; RE ONTARIO (MINISTER OF LABOUR); OLRB; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RAINBOW CONCRETE INDUSTRIES LIMITED..(Nov./Dec.) 1011

Practice and Procedure – Accreditation – Construction Industry – Employer – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed

THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND

DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089 .... (Nov./Dec.) 994

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Unfair Labour Practice – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD .... (Jan./Feb.) 92

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Intervenor – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS

OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA...(Nov./Dec.) 751

Practice and Procedure – Apprehension of Bias – Construction Industry – The applicant alleged an apprehension of bias in that the Vice-Chair deciding the matter (a dispute that the International violated sections 147 and/or 149) had been retained, in his personal capacity as an arbitrator, by the International (and not the Local) to determine the Carpenters ICI Collective Agreement for 2010-2013 – The Board noted that the parties to the Provincial Collective Agreement (the Carpenters' Employer Bargaining Agency and the Carpenters' District Council of Ontario [CDC]) were different from the parties before the Board (the International and Local 1256) – The Board noted that the degree of institutional impartiality and independence of the Board is well known and not challenged by the applicant – The Board found that while it may envision a situation in which the conduct of an individual may bring such impartiality and independence into question, it was not the case where a person acting as an independent adjudicator in a role that involved related but different parties and that required neutrality and credibility somehow compromises his or her independence and neutrality as a Vice-Chair – The Board concludes that an apprehension of bias was not made out – Matter continues

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 .... (Sept./Oct.) 719

Practice and Procedure – Bargaining Rights – Certification – Construction Industry – Reconsideration – BACU (and BACU & Local 31) applied for certification in respect of bargaining units they already represented – The Board, on its own motion, directed submissions on whether an application made by a trade union that already holds bargaining rights for all of the employees in the bargaining unit for which it seeks certification as bargaining agent is an application for certification within the meaning of section 7 of the Act – The Board found that, other than closing the open period, there was no purpose served by such an application – Given that the trade union would simply acquire exactly what it already has, the Act did not contemplate a trade union displacing itself – The Board further found that an interpretation of s. 7 that allowed a trade union to displace itself would be inconsistent with other provisions of the Act and could lead to absurd results – Finally, the Board found that the purposes of the Act would be undermined if a trade union could apply to be recertified – Applications dismissed

BERNEL MASONRY INC. ET AL; RE BACU...(Jul./Aug.) 450

Practice and Procedure – Bargaining Rights – Construction Industry – Termination – Trade Union – The Board confirmed that applicants seeking to terminate bargaining rights in the ICI sector may deliver their applications to either the employee bargaining agency or the local union with whom they have a relationship – The Board decided that the trade union named as the respondent has the obligation to give notice of the termination application to the Employee Bargaining Agency and the affiliated bargaining agents – Matter continues

KIDD MECHANICAL INC.; RE EMPLOYEES OF KIDD MECHANICAL INC. REPRESENTED BY VIKKI SCHLONIES; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ON ITS OWN BEHALF AND ON BEHALF OF ALL OF ITS AFFILIATED BARGAINING AGENTS... (Mar./Apr.) 282

Practice and Procedure – Certification – Construction Industry – Bargaining Unit – Status – The employer and the union did not agree on the list of employees who were at work on the date of application and performing work within the scope of the bargaining unit – The employer challenged the sufficiency of the union's submissions as they failed to contain detailed facts and failed to establish a *prima facie* case as per the Board's Information Bulletin No. 9 – The Board confirmed that where a party states that a name belongs on the employee list, the submissions filed will generally be required to contain sufficient facts to establish that the person was at work and performing bargaining unit work for a majority of the day on the date of application – The Board found that the union's submissions were deficient as they did not describe the work being performed on the date of application notwithstanding that such information appeared to be available to the union – The Board directed the union to file any further submissions upon which it wished to rely – Matter continues

CONTERRA RESTORATION LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183 ....(May/June) 379

Practice and Procedure – Certification – Construction Industry – Status – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51......................(Nov./Dec.) 733

Practice and Procedure – Certification – Displacement – Natural Justice – Representation Vote – Trade Union – In a displacement application for certification, Workers United Ontario Council (WUOC), the losing trade union in a close vote, raised an issue concerning the conduct of the representation vote – The vote consisted of two one-hour polls, one in the morning, the other in the evening – During the first fifteen minutes of the evening poll, the building doors were locked barring access to potential voters – Inquiries made by WUOC did not indicate that any individual was prevented from voting due to lack of access – WUOC requested another vote which UNITE HERE opposed – The Board followed the principle that "when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election" – The Board found that voters are entitled to a high standard of integrity, but not perfection in the conduct of representation votes – The Board concluded that there was no evidence the error prevented anyone from voting, and declined to disregard the outcome of the balloting – Matter continues

NORDIC GAMING CORPORATION; RE WORKERS UNITED ONTARIO COUNCIL; RE UNITE HERE ....(Jul./Aug.) 495

Practice and Procedure – Certification – Membership Evidence – The union filed membership evidence that was undated – The Board found that undated membership cards is not evidence that the Board can rely on in deciding whether to order a representation vote – The Board noted that Rule 9.2 requires that membership evidence must disclose the date upon which each signature was obtained – Further the Board found it was unlikely that it could rely upon affidavit evidence to provide the dates the cards were signed, given s. 8(3) prevents the Board from considering the affidavit and it would defeat the quick vote scheme of the Act – Finally, given the large number of undated cards this would not be an appropriate case, in any event, to relieve against the Board's rules – Application dismissed

STOCK TRANSPORTATION LTD.; RE AMALGAMATED TRANSIT UNION LOCAL 1573 ....(May/June) 442

Practice and Procedure – Certification – Natural Justice – Related Employer – Sale of Business – Reconsideration – Termination – Subsequent to the filing of a 69/1(4) application the UFCW and responding employers settled the matter in a way that affected employees in locations other than those which had received notice of the original applications – Neither the parties nor the Board ensured that these additional employees received notice of the Board's decision, reflecting the parties' settlement, which affected their rights – Given a timely objection by employees from one of the stores for which notice was not provided, the Board varied its decision to exclude the store from the bargaining unit descriptions contained in its earlier decision – Termination application dismissed – Certification continues

PHARMA PLUS DRUGMARTS LTD., KATZ GROUP CANADA LTD. AND PHARMX REXALL STORES LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 414 ....(May/June) 436

Practice And Procedure – Certification – Representation Vote – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered

ROYAL VICTORIA HOSPITAL; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA ....(Nov./Dec.) 811

Practice and Procedure – Certification – When the description of the bargaining unit and the status of four individuals remained following the Regional Certification Meeting, the Board scheduled a hearing in Toronto – The employer requested that the venue of the hearing be changed to Windsor because it could not afford the cost of travelling to Toronto or bringing its three witnesses to the hearing – The Board pointed to its travel policy which outlines the limited funding and human resources available for travel outside of Toronto – In matters such as applications for certification, the policy requires the first two days of the hearing to take place in Toronto – The Board did note it has discretion to depart from this policy in exceptional circumstances (for example the health of a party or witness), but found no sufficiently compelling reasons to depart from the policy in this matter – Matter proceeds

MICHAEL ANTHONY ALLSOP O/A ADVANCED SOLAR SOLUTIONS; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS CONSTRUCTION COUNCIL OF ONTARIO ....(Jul./Aug.) 493

Practice and Procedure – Construction Industry – First Contract Arbitration – Reconsideration – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 ....(Jan./Feb.) 20

Practice and Procedure – Discharge for Union Activity – Interim Relief – The SEIU sought an interim order for reinstatement of a probationary employee – A decision had been made by the employee's supervisor that she was not suitable for permanent employment – This decision was not communicated to the employee because she had requested a leave of absence to complete a professional examination – Upon her return, the employee learned of the organizing campaign and began showing her support – She was terminated five days later – SEIU alleged that the discharge effectively halted the union's organizing efforts – Princess Gardens conceded that a campaign to establish bargaining rights was underway and that there was a serious issue to be decided in the pending proceeding – The Board did not find it necessary to determine whether relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives or whether the balance of harm favoured the granting of the interim relief, because it appeared to the Board that the dismissal was unrelated to the exercise of the employee's rights in support of the union – The Board found that Princess Gardens had a plausible basis for ending the employee's employment and its explanation for the delay in informing her of the dismissal was also plausible – The Board found on a preliminary assessment that the discharge was unrelated to the exercise of rights under the Act by an employee and therefore the Board was prevented from exercising its discretion to reinstate – Application for interim relief dismissed

PRINCESS GARDENS RETIREMENT RESIDENCE; RE SEIU, LOCAL 1 CANADA .... (Mar./Apr.) 309

Practice and Procedure – Duty of Fair Representation – Unfair Labour Practice – After finding that the complainant had not made out a prima facie case, and reviewing eight previous duty of fair representation complaints, the Board found the complainant to be a vexatious litigant on the basis of the following material: he brought multiple proceedings making basically the same allegations; he consistently sought relief the Board would not conceivably grant; he made unjustifiable and unreasonable aspersions against the lawyers representing the Union and its officials and representative, and against the adjudicators and officers of the Board; for the Board to address the series of exaggerated and unsupported allegations was an abuse of public resources and an abuse of process – The applicant was declared a vexatious litigant and not permitted to file a complaint against the union or employer without leave of the Board – Application dismissed

DR. PETER A. KHAITER; RE YORK UNIVERSITY FACULTY ASSOCIATION (YUFA).. (Sept./Oct.) 622

Practice and Procedure – Evidence – Natural Justice – Trade Union – UNITE HERE brought a motion to admit the transcripts taken by a court reporter during eleven hearing days presided over by the Chair, who was appointed a Judge of the Superior Court of Justice of Ontario, and as a result was unable to continue to hear and determine these proceedings – UNITE HERE had been granted permission to have a court reporter create transcripts of the evidence with the usual understanding that the transcripts must be shared with the other parties and the Board and were not an official record – At a reconstituted hearing before a different Vice-Chair, the use of these transcripts for the purpose of expediting the proceedings was explored – Workers United Ontario Council (WUOC) indicated that it was not prepared to consent to the use of the transcript, predominately because such a process did not accord with the principles of natural justice given the dangers surrounding the admittance of hearsay evidence – The Board found that a reading of sections 111(2)(e) of the Act and s. 15(1) of the *Statutory Powers Procedure Act* clearly indicated that the authority to admit hearsay evidence such as the transcripts is within its power – On analysis as to whether the transcripts ought to be admitted, the Board indicated that the relevancy, reliability, unfairness and any violations of natural justice should provide the basis upon which it should determine whether to accept or reject hearsay evidence – Ultimately, the Board found that the provision of an opportunity for WUOC to cross-examine witnesses on their adoption of the prior statements under the observation of the Vice-Chair effectively ensured that there was no unfairness or violation of natural justice arising from the dangers associated with admitting hearsay evidence – Accordingly, the transcripts were admitted as evidence – Matter continues

UNITE HERE; RE WORKERS UNITED ONTARIO COUNCIL AND ARAMARK CANADA LTD.. (Jul./Aug.) 568

Prima facie motion – Discharge – Duty to Bargain in Good Faith – Strike – Unfair Labour Practice – The parties settled a strike leaving one outstanding issue: whether Vale's refusal to agree to an arbitration process that could result in the reinstatement of striking employees discharged during the strike violated s. 17 of the Act – The Board noted that

USW's interpretation of *Royal Oak* would mean that it would be a breach of the duty to bargain for a party to maintain an objectively unreasonable position to impasse, regardless of the party's motivation for doing so, and that this position would effectively render "illegal *per se*" that which neither any specific provision nor the scheme of the Act as a whole makes illegal – The Board concluded that the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike was not sufficient in and of itself to give rise to a breach of the duty to bargain – Next, concerning Vale's position that USW had not pled a *prima facie* case, the Board held that the USW had pled that Vale maintained to impasse a position of refusing to agree to just cause arbitration and that this was unusual and *Royal Oak* provides a basis for arguing that it is objectively unreasonable – Accordingly, the Board dismissed the prima facie motion, finding that a reasonable argument could be made on the basis of USW's pleadings which would result in the conclusion that Vale breached its duty to bargain – Finally, the Board found that Vale was entitled to lead the evidence with respect to the reasons it maintained its position – Matter continues

VALE INCO LIMITED; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 6500 AND ITS LOCAL 6200..................(Jul./Aug.) 548

Reconsideration – Bargaining Rights – Certification – Construction Industry – Practice and Procedure – BACU (and BACU & Local 31) applied for certification in respect of bargaining units they already represented – The Board, on its own motion, directed submissions on whether an application made by a trade union that already holds bargaining rights for all of the employees in the bargaining unit for which it seeks certification as bargaining agent is an application for certification within the meaning of section 7 of the Act – The Board found that, other than closing the open period, there was no purpose served by such an application – Given that the trade union would simply acquire exactly what it already has, the Act did not contemplate a trade union displacing itself – The Board further found that an interpretation of s. 7 that allowed a trade union to displace itself would be inconsistent with other provisions of the Act and could lead to absurd results – Finally, the Board found that the purposes of the Act would be undermined if a trade union could apply to be recertified – Applications dismissed

BERNEL MASONRY INC. ET AL; RE BACU..(Jul./Aug.) 450

Reconsideration – Bargaining Unit – Certification – Following resolution of status disputes, the Board determined that the applicant had between 40 and 55% support for its application, and ordered a vote – On the date the vote decision was sent to the parties (but before they received it), the applicant provided the Board with an accurate membership list, persuading the Board that the applicant had greater than 55% support for its unit – The Board revoked the earlier decision and issued a fresh decision certifying the applicant – The employer sought reconsideration of the latter decision, arguing that the Board had no authority to consider submissions made by the applicant after the hearing had ended – The Board found there is nothing in its Rules that addresses whether a party may file written submissions after a hearing has concluded – Information relating to membership evidence was properly not provided to the employer by the applicant; however, in response to the request for reconsideration, the applicant had provided the employer with its post-hearing list, so the employer was not prejudiced –The information provided by the applicant dealt only with the identity of certain individuals (e.g., clarification of spelling), and not with their status (which was the subject of the hearing before the Board) – The Board found it had made an error in assessing the membership evidence and ordering the vote and therefore appropriately reconsidered its decision – Employer's request for reconsideration denied

QUALITY RUGS OF CANADA LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 ....(Jul./Aug.) 524

Reconsideration – Certification – Natural Justice – Related Employer – Sale of Business – Practice and Procedure – Termination – Subsequent to the filing of a 69/1(4) application the UFCW and responding employers settled the matter in a way that affected employees in locations other than those which had received notice of the original applications – Neither the parties nor the Board ensured that these additional employees received notice of the Board's decision, reflecting the parties' settlement, which affected their rights – Given a timely objection by employees from one of the stores for which notice was not provided, the Board varied its decision to exclude the store from the bargaining unit descriptions contained in its earlier decision – Termination application dismissed – Certification continues

PHARMA PLUS DRUGMARTS LTD., KATZ GROUP CANADA LTD. AND PHARMX REXALL STORES LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 414 ....(May/June) 437

Reconsideration – Certification – Timeliness – The Board certified the trade union based on sufficient card-based membership, and stated in its decision that it had no regard to the employer's late-filed response – In its request for reconsideration, the employer deposed by affidavit that it had received misleading information regarding the time limit for its response from a Board clerk – The Board sets out the policy underlying its reluctance to permit parties to rely on oral evidence from Board staff to justify non-compliance with requirements established by the Act and the Rules (see *Sarnia Construction*) – In this case, the affidavit sworn by the employer's representative indicated he advised the Board clerk he had only received the applicant's information that day, which was the day relied upon by the Board staff – However, correspondence from the employer's counsel clearly showed that the responding party had received the application a day earlier and knew the date from which it was required to calculate the time for filing the response – Request for reconsideration dismissed

BUILD-ALL CONTRACTORS; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL ....(Jul./Aug.) 445

Reconsideration – Certification – Timeliness –In its response to the application for certification the employer indicated its disagreement with both the description of the bargaining unit and the union's estimate of individuals in it; and also checked "no" in response to the question whether it was giving an 8.1 notice – One day after the two day statutory time limit expired, the employer wrote the Board saying the "no" was inadvertent and it had provided the necessary information under 8.1 – The Board found the notice untimely; one week after the vote was taken and counted the employer applied for reconsideration – The Board rejected the employer's first argument that it had complied with the Act and given notice – The Board found the "no" coupled with the employer's failure to answer the supplementary question in addition to the statutory requirement indicated to it that notice was not given – The Board also rejected the alternative argument that it should exercise its discretion to extend the notice, when it found, assuming it had such discretion, that it would only grant relief in the most compelling circumstances, and there were none in these circumstances – Request for reconsideration denied

THE CORPORATION OF THE TOWN OF TECUMSEH; RE CUPE............ (Sept./Oct.) 713

Reconsideration – Construction Industry – First Contract Arbitration – Practice and Procedure – Termination – Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 ....(Jan./Feb.) 20

Reconsideration – Construction Industry Grievance – Hydro One sought reconsideration of the Board's decision that it had violated the contracting out provisions of the Principal Agreement – On a more extensive review of the case law the Board found no support for Hydro One's position that no "contracting out" occurs where an employer enters into an agreement with another entity to perform work on its behalf that would otherwise be performed by bargaining unit employees where the employer had no other option (Hydro One's arrangement with CN required Hydro One to have its transformer off-loaded from a rail car by employees of a subcontractor to CN which were not bound to the Principal Agreement) – The Board found that the situation that Hydro One found itself in may be relevant to remedy, but not to whether the contracting out provision of the Principal Agreement had been violated – Reconsideration denied

HYDRO ONE NETWORKS INC.; RE CANADIAN UNION OF SKILLED WORKERS...(May/June) 394

Reconsideration – Health and Safety – The Board allowed an appeal of the Inspector's order ([2010] OLRB Rep. Jan/Feb 199) and both the Union and the Ministry of Labour applied for reconsideration – The Union submitted that the underlying factual basis for the Board's decision had changed significantly since the employer had decided to reopen one of the mines which was only on care and maintenance – The Board found that the evidence that the Union sought to put before the Board related to developments that occurred or will take place after the order under appeal was issued, and were accordingly irrelevant and would not be considered by the Board – The Board went on to note that the dismissal of the appeal and denial of the reconsideration did not preclude an inspector conducting another investigation and making a determination with respect to the employer's compliance with the Regulations based on the facts that exist when the investigation takes place – Reconsideration denied

XSTRATA CANADA CORPORATION; RE UNITED STEELWORKERS, LOCAL 2020; RICK KULYSKI, INSPECTOR; AND CAW CANADA AND ITS LOCAL 598 .... (Mar./Apr.) 354

Reference – Collective Agreement – Conciliation – The Minister sought advice on whether he could appoint a conciliation officer pursuant to s. 18(2) – The evidence established that prior to the termination of the collective agreement (which had an automatic renewal clause) the union representative left voicemail messages advising that they wished to set dates for bargaining and that their only demand was to increase wage rates to a specific amount; and that the employer representative called the union representative back and spoke with him, at which time he reiterated the demand for wage rate increase – As neither party had given written notice to bargain, the critical question was whether the parties had "met and bargained" – The Board, following *Danver Ambulance*, found that the words "met and bargained" did not necessarily mean a face-to-face meeting provided that a person authorized to bargain for one party makes a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party – The Board also noted that given the advancement in technology since *Danver* was written, its reasoning is that much more persuasive today – The Board found that the conditions for the application of s. 18(2) were present – Advice given

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18..(Nov./Dec.) 739

Reference – *Hospital Labour Disputes Arbitration Act* – Trade Union – The question referred to the Board on a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (HLDAA) was whether or not bargaining unit employees are covered by HLDAA – CUPE took the position that HLDAA applied while Rothwell opposed this view – The advice provided by the Board was that the bargaining unit employees of this employer are not covered by HLDAA – Rothwell is not an enumerated institution under the definition of "hospital" in HLDAA because its employees primarily provide cleaning, and not personal care services – The Board found that the health, safety or well-being of the residents would not be jeopardized by a strike and that Rothwell was not an institution operated for the "care, observation or treatment" of those clients within the meaning of section 3(2) of HLDAA – Advice provided

ROTHWELL HEIGHTS LODGE; CUPE AND ITS LOCAL 3317...................(Jul./Aug.) 533

Related Employer – Abandonment – Bargaining Rights – Construction Industry – Delay – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ....(Nov./Dec.) 839

Related Employer – Certification – Construction Industry – LIUNA sought to certify the employees of Mirtren Contractors Limited and shortly thereafter filed an application for relief under the related employer provision of the Act, citing also Mirtren Construction Limited and Mirtren Builders Ltd. (claim against latter company dropped) – The employees of Mirtren Contractors were represented by CLAC – Contractors asserted it had no employees in the bargaining unit sought by LIUNA - The Board found that although both Contractors and Construction were owned by one individual, they carried on business in two distinct divisions, geographically apart, with each division reporting to different management for operational and labour relations purposes – The Board dismissed the application for a declaration that the companies were related but, given there was no prejudice to Construction, was satisfied that it should invoke s. 112 to find that the responding party had been incorrectly named in the application for certification – Matters continue

MIRTREN CONTRACTORS LIMITED AND MIRTREN CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Sept./Oct.) 644

Related Employer – Certification – Natural Justice – Sale of Business – Practice and Procedure – Reconsideration – Termination – Subsequent to the filing of a 69/1(4) application the UFCW and responding employers settled the matter in a way that affected employees in locations other than those which had received notice of the original applications – Neither the parties nor the Board ensured that these additional employees received notice of the Board's decision, reflecting the parties' settlement, which affected their rights – Given a timely objection by employees from one of the stores for which notice was not provided, the Board varied its decision to exclude the store from the bargaining unit descriptions contained in its earlier decision – Termination application dismissed – Certification continues

PHARMA PLUS DRUGMARTS LTD., KATZ GROUP CANADA LTD. AND PHARMX REXALL STORES LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 414 ....(May/June) 437

Related Employer – Certification – The Labourers sought certification for two employees engaged to carry out the "pump watch" at the Ear Falls Project during a specified short period of time – The application for certification and the relief sought under s. 1(4) of the *LRA* were dependent on a finding that one or more of SNC Lavalin Inc., SNC-Lavalin

Group Inc. and SNC-Lavalin Power Ontario Inc. (collectively "SNC") was the employer of the two labourers – The Board found that when the original subcontracting arrangements made by SNC collapsed, efforts were made to ensure that there was continuity for the pump watch responsibilities – SNC was sensitive, however, to the employer issue long before the arrangements for the pump watchers were made; it took steps to ensure that it was not, and was not seen to be, the employer of the labourers – The Board held that there was no doubt that the work performed was for the benefit of SNC and that SNC was ultimately responsible for the labourers being paid through its contract with a subcontractor – However, fundamental control over the labourers at the relevant time was exercised by a contracted project manager, and not SNC – Applications dismissed

SNC LAVALIN INC.; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. (Sept./Oct.) 697

Remedies – Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL........(Jan./Feb.) 1

Remedies – Certification Where Act Contravened – Construction Industry – Interference with Trade Unions – Unfair Labour Practice – The Carpenters commenced an organizing campaign by having an employee of Southend distribute cards – The owner's brother, who was the employee's supervisor, openly expressed his dislike of unions, and burned another employee's union card at the workplace, in front of several other employees – The employer argued that the discharge of the employee who began distributing cards was for excessive absences, and for drinking during lunch – The Board found that the termination of the employee effectively put an end to the organizing campaign – The Board preferred the discharged employee's evidence over that of the employer's witnesses – Although his attendance may have been at issue, it was not the reason for the discharge – Other employees were reprimanded for drinking at lunch; the inside organizer was terminated – The employer did nothing to distance himself from his brother's anti-union behaviour – The Board was satisfied that a representation vote would not reflect the true wishes of employees – Certificate granted

SOUTHEND DRYWALL & ACOUSTICS LTD.; RE UBCJA, LOCAL 2486........(Mar./Apr.) 317

Representation Vote – Certification – Displacement – Natural Justice – Practice and Procedure – Trade Union – In a displacement application for certification, Workers United Ontario Council (WUOC), the losing trade union in a close vote, raised an issue concerning the conduct of the representation vote – The vote consisted of two one-hour polls, one in the morning, the other in the evening – During the first fifteen minutes of the evening poll, the building doors were locked barring access to potential voters – Inquiries made by WUOC did not indicate that any individual was prevented from voting due to lack of access – WUOC requested another vote which UNITE HERE opposed – The Board followed the principle that "when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election" – The Board found that voters are entitled to a high standard of integrity, but not perfection in the conduct of representation votes – The Board concluded that there was no evidence the error prevented anyone from voting, and declined to disregard the outcome of the balloting – Matter continues

NORDIC GAMING CORPORATION; RE WORKERS UNITED ONTARIO COUNCIL; RE UNITE HERE........(Jul./Aug.) 495

Representation Vote – Certification – Practice And Procedure – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered

ROYAL VICTORIA HOSPITAL; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA ....(Nov./Dec.) 811

Sale of a Business – Bargaining Rights – *Crown Employees Collective Bargaining Act* – This application under s. 10 of the *Crown Employees Collective Bargaining Act* (CECBA) and s. 69 of the *Labour Relations Act* (LRA) relates to the Crown's decision to cancel contracts between the Crown and York Detention Centre Ltd. (YDC) resulting in the lay off of members of OPSEU – The issues were (1) whether the termination of the Crown's contract with YDC and the transfer of young offenders to the Roy McMurtry Youth Centre (RMYC) amounted to a transfer of an undertaking for the purposes of CECBA such that s. 69 of the LRA applied to bind the Crown to the YDC Collective Agreement and (2) whether such a transfer would grant YDC employees collective agreement rights at RMYC in Brampton notwithstanding that the geographic scope of the collective agreement is limited to Toronto – The Board found that the right to house young offenders, the obligation to provide them services and the funding necessary to do so as derived from the contract was transferred from YDC back to the Crown at RMYC – These were the essential elements of YDC's undertaking, without which it could not operate its business – Accordingly, the Board found that there had been a transfer of an undertaking within the meaning of CECBA from YDC to the Crown at RMYC such that s. 69 of the LRA applied, binding the Crown to the YDC Collective Agreement – On the second issue, the Board followed the principle found in *Silverwood Dairies* that successor rights provisions do not operate to extend bargaining rights beyond the geographic scope of the collective agreement binding the predecessor – Accordingly, the Board denied OPSEU's request for orders requiring the Crown to recognize the collective agreement rights of YDC employees at RMYC

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CHILDREN AND YOUTH SERVICES, YORK DETENTION CENTRE LTD. AND NORTHERN YOUTH SERVICES INC.; RE OPSEU ....(Jul./Aug.) 471

Sale of a Business – Union Successor Rights – BFI purchased York Disposal, and merged operations, intermingling employees and overlapping the scope clauses of the two bargaining units of the same union – The employer applied under s.69(6) to terminate the York bargaining rights so its existing collective agreement with BFI could apply to all employees – The union challenged the application, arguing that s.69 operates to preserve and protect bargaining rights and the expiry of the York collective agreement precluded any order under s.69(6)(a-d); further, the application of s.69(6) is restricted to different, competing bargaining agents – The Board rejected both arguments, holding that s.69(6) applied even though the same union represented both groups of employees – The Board held that s.69 must be read in its entirety: while an order under s.69(6)(a) may not be available, the Board retained the authority to grant a remedy pursuant to s.69(6)(b)-(d) – Further, the Board noted that while the intent of s.69 is to preserve and protect bargaining rights, s.69(6) operates despite these protective provisions in order to resolve the labour relations issues caused by intermingling following a sale – The Board exercised its discretion to grant the order sought

BFI CANADA INC; RE TEAMSTERS LOCAL UNION NO. 419 .... (Sept./Oct.) 594

Sale of Business – Abandonment – Bargaining Rights – Construction Industry – Delay – Related Employer – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA .... (Nov./Dec.) 839

Sale of Business – Certification – Natural Justice – Related Employer – Practice and Procedure – Reconsideration – Termination – Subsequent to the filing of a 69/1(4) application the UFCW and responding employers settled the matter in a way that affected employees in locations other than those which had received notice of the original applications – Neither the parties nor the Board ensured that these additional employees received notice of the Board's decision, reflecting the parties' settlement, which affected their rights – Given a timely objection by employees from one of the stores for which notice was not provided, the Board varied its decision to exclude the store from the bargaining unit descriptions contained in its earlier decision – Termination application dismissed – Certification continues

PHARMA PLUS DRUGMARTS LTD., KATZ GROUP CANADA LTD. AND PHARMX REXALL STORES LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 414 .... (May/June) 437

Settlement – Delay – Duty of Fair Representation – Health and Safety – Judicial Review – The applicant sought review of two Board decisions, one dismissing a s. 74 complaint, and the second dismissing a s. 50 OHSA application in favour of an ongoing proceeding before the Grievance Settlement Board – The matter was settled at the GSB, and the applicant asked the Court to set aside the Minutes of Settlement (MOS) – The Court found there was no evidence of the applicant's diminished capacity during the GSB proceeding, so the MOS was fatal to his claim – In addition the MOS was not a reviewable decision – The applications for review of the Board rulings were dismissed for delay

DONALD AMODEO; RE ONTARIO MINISTRY OF LABOUR (HER MAJESTY IN RIGHT OF ONTARIO), ATTORNEY GENERAL OF ONTARIO, GRIEVANCE SETTLEMENT BOARD, OPSEU AND OLRB .... (Mar./Apr.) 360

Standing – Abandonment – Certification – Construction Industry – Status – Timeliness – In its response to a certification application, the employer asserted that it was bound to a collective agreement with an employee association and therefore the application was untimely – The union challenged the status of the association, and argued that the employer had no standing to proffer arguments on behalf of the association which, the union alleged, had abandoned its bargaining rights by failing to file a response or intervention – The Board found that the employer, as signatory to the agreement, could make arguments asserting the existence of the association and the validity of the collective agreement – The employer was not purporting to advance interests of individual employees – Matter continues

ECONOMY PAVING COMPANY (ST. CATHARINES) LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(May/June) 390

Standing – Construction Industry – Alteration of Jurisdiction – Intervenor – Practice and Procedure – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA..(Nov./Dec.) 751

Standing – Unfair Labour Practice – Milk and Bread Drivers Local 647 and Bakery, Confectionary Local 264 each had collective agreements with Canada Bread at different locations – Local 647 claimed that a collective agreement entered into between Canada Bread and Local 264 was void because it was spawned following the early termination of an existing agreement, and notice of the early termination had not been properly posted – Local 647 argued that the employer had effectively "chosen" 264 over 647 to be the bargaining agent of a new facility it was planning to open – The applicant also argued that the new agreement gave Local 264 bargaining rights beyond the geographic scope of any rights it actually held – Finally, Local 647 submitted that its own collective agreement with one of Canada Bread's facilities provided that its employees would be offered jobs at the new facility – The Board held that Local 647 had no standing to challenge the early termination: Local 647 was not affected in any way by it and only an employee in Local 264's bargaining unit could claim the improper posting – There were several possible consequences of the new collective agreement between Local 264 that could affect the employees represented by Local 647, but since the new facility had not opened and there were no employees currently working there, those consequences were speculative – The applicant had no standing to bring these challenges – Application dismissed

CANADA BREAD COMPANY, LIMITED AND BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION AFL-CIO, CLC, LOCAL 264; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION 647.................. (Sept./Oct.) 616

Status – Abandonment – Certification – Construction Industry – Standing – Timeliness – In its response to a certification application, the employer asserted that it was bound to a collective agreement with an employee association and therefore the application was untimely – The union challenged the status of the association, and argued that the employer had no standing to proffer arguments on behalf of the association which, the union alleged, had abandoned its bargaining rights by failing to file a response or intervention – The Board found that the employer, as signatory to the agreement, could make arguments asserting the existence of the association and the validity of the collective agreement – The employer was not purporting to advance interests of individual employees – Matter continues

ECONOMY PAVING COMPANY (ST. CATHARINES) LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(May/June) 390

Status – Bargaining Rights – Employee – Termination – IBEW Local 115 held bargaining rights in the ICI sector and in all other sectors in Board Area 12 – In a previous decision, the Board held that the termination application was untimely with respect to the ICI sector, but was timely as it related to all other sectors – On the date of application, the individual applicant performed ICI work for the majority of the day and non-ICI work for a minority of the day – The issue before the Board was whether an employee must spend a majority of his/her work day performing bargaining unit work in order to be an "employee in a bargaining unit" for the purposes of a termination application – The Board found that applying the "majority of time test to sectors" used in certification applications did not make labour relations sense in the context of termination applications – There was no compelling justification to disqualify an individual as an employee of the bargaining unit in circumstances where that individual, on the date of application, performed work within the geographic area of the bargaining unit, within the scope of the bargaining unit and of the type covered by the collective agreement or certificate in the relevant sector, albeit not for the majority of the workday – The Board found that the applicant was an employee in the bargaining unit on the date of application – The Board found that the majority of time principle, as it relates to sectors, was not applicable to termination applications in the construction industry – Ballot to be counted

TERRY SHORTT ELECTRICAL SERVICES LTD.; RE GLYNN SAYEAU; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO QUINTE & ST. LAWRENCE ELECTRICAL WORKERS LOCAL UNION 115..................... (Mar./Apr.) 342

Status – Bargaining Unit – Certification – This application raised two issues: whether the Union's proposed bargaining unit improperly excluded five yard dispatchers; and whether S and B were employees at the time of the vote – The Board noted that the Union's proposed bargaining unit need not be the best possible, but its configuration should be viable without causing serious labour relations problems – There were several considerations: the dispatchers would be the only full-time employees in the distribution centre not represented; they had little prospect of attracting a trade union; there would be fewer work opportunities for bargaining unit members because many of the dispatchers were sourced from bargaining unit positions; it was a condition of employment that bargaining unit employees cover the dispatcher positions; and a dispatcher position was a logical placement for employees with physical restrictions and/or who were in need of accommodation due to disability – The Board held that the Union's proposed exclusion of the yard dispatchers created undue fragmentation – As for the two remaining disputed employees, the Board determined that S, on maternity leave of finite duration with a statutorily protected right to return to her position, was an employee at the time of the vote, but B, away from the workplace, earning no wages, for almost twenty months, was not – B's continued group benefit coverage and employee discount were not evidence of a substantial connection to the workplace – Ballots to be counted in accordance with Board decision

HUDSON'S BAY COMPANY; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA)..........................(Jan./Feb.) 63

Status – Certification – Construction Industry – Practice and Procedure – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51......................(Nov./Dec.) 733

Status – Certification – Construction Industry – Bargaining Unit – Practice and Procedure – The employer and the union did not agree on the list of employees who were at work on the date of application and performing work within the scope of the bargaining unit – The employer challenged the sufficiency of the union's submissions as they failed to contain detailed facts and failed to establish a *prima facie* case as per the Board's Information Bulletin No. 9 – The Board confirmed that where a party states that a name belongs on the employee list, the submissions filed will generally be required to contain sufficient facts to establish that the person was at work and performing bargaining unit work for a majority of the day on the date of application – The Board found that the union's submissions were deficient as they did not describe the work being performed on the date of application notwithstanding that such information appeared to be available to the union – The Board directed the union to file any further submissions upon which it wished to rely – Matter continues

CONTERRA RESTORATION LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183..(May/June) 379

Stay – Judicial Review – Natural Justice – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed

MARK CORNER; RE ONTARIO (MINISTER OF LABOUR); OLRB; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RAINBOW CONCRETE INDUSTRIES LIMITED..(Nov./Dec.) 1011

Strike – Discharge – Duty to Bargain in Good Faith – *Prima facie* motion – Unfair Labour Practice – The parties settled a strike leaving one outstanding issue: whether Vale's refusal to agree to an arbitration process that could result in the reinstatement of striking employees discharged during the strike violated s. 17 of the Act – The Board noted that USW's interpretation of *Royal Oak* would mean that it would be a breach of the duty to bargain for a party to maintain an objectively unreasonable position to impasse, regardless of the party's motivation for doing so, and that this position would effectively render "illegal *per se*" that which neither any specific provision nor the scheme of the Act as a whole makes illegal – The Board concluded that the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike was not sufficient in and of itself to give rise to a breach of the duty to bargain – Next, concerning Vale's position that USW had not pled a *prima facie* case, the Board held that the USW had pled that Vale maintained to impasse a position of refusing to agree to just cause arbitration and that this was unusual and *Royal Oak* provides a basis for arguing that it is objectively unreasonable – Accordingly, the Board dismissed the prima facie motion, finding that a reasonable argument could be made on the basis of USW's pleadings which would result in the conclusion that Vale breached its duty to bargain – Finally, the Board found that Vale was entitled to lead the evidence with respect to the reasons it maintained its position – Matter continues

VALE INCO LIMITED; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 6500 AND ITS LOCAL 6200..................(Jul./Aug.) 548

Termination – Bar – Bargaining Rights – The Board issued reasons for its earlier "bottom line" determination that the applicant ought to be barred from pursuing a second termination application just two months after a first such application was dismissed when the union won the representation vote – The Board held that the exercise of its discretion under s. 111(2)(k) involves a careful weighing of competing interests and objectives – The employees had been given the opportunity to determine by secret ballot whether they wanted the union to continue to represent them, and a majority of them voted in favour of continued representation – Once a vote has been taken and counted, there must be a compelling reason to subject the stability of the collective bargaining relationship to the uncertainty of another test of the union's representation rights – No unusual circumstances were present here – The union should not be distracted from its obligations to bargain by having to defend a second attack on its bargaining rights – Application dismissed

ONTARIO LOTTERY AND GAMING CORP-ORATION c.o.b. as OLG BRANTFORD CASINO; RE JASON BONNEY; RE SEIU LOCAL 2, BREWERY, GENERAL AND PROFESSIONAL WORKERS' UNION... (Mar./Apr.) 292

Termination – Bargaining Rights – Construction Industry – Practice and Procedure – Trade Union – The Board confirmed that applicants seeking to terminate bargaining rights in the ICI sector may deliver their applications to either the employee bargaining agency or the local union with whom they have a relationship – The Board decided that the trade union named as the respondent has the obligation to give notice of the termination application to the Employee Bargaining Agency and the affiliated bargaining agents – Matter continues

KIDD MECHANICAL INC.; RE EMPLOYEES OF KIDD MECHANICAL INC. REPRESENTED BY VIKKI SCHLONIES; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ON ITS OWN BEHALF AND ON BEHALF OF ALL OF ITS AFFILIATED BARGAINING AGENTS... (Mar./Apr.) 282

Termination – Bargaining Rights – Employee – Status – IBEW Local 115 held bargaining rights in the ICI sector and in all other sectors in Board Area 12 – In a previous decision, the Board held that the termination application was untimely with respect to the ICI sector, but was timely as it related to all other sectors – On the date of application, the individual applicant performed ICI work for the majority of the day and non-ICI work for a minority of the day – The issue before the Board was whether an employee must spend a majority of his/her work day performing bargaining unit work in order to be an "employee in a bargaining unit" for the purposes of a termination application – The Board found that applying the "majority of time test to sectors" used in certification applications did not make labour relations sense in the context of termination applications – There was no compelling justification to disqualify an individual as an employee of the bargaining unit in circumstances where that individual, on the date of application, performed work within the geographic area of the bargaining unit, within the scope of the bargaining unit and of the type covered by the collective agreement or certificate in the relevant sector, albeit not for the majority of the workday – The Board found that the applicant was an employee in the bargaining unit on the date of application – The Board found that the majority of time principle, as it relates to sectors, was not applicable to termination applications in the construction industry – Ballot to be counted

TERRY SHORTT ELECTRICAL SERVICES LTD.; RE GLYNN SAYEAU; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO QUINTE & ST. LAWRENCE ELECTRICAL WORKERS LOCAL UNION 115..................... (Mar./Apr.) 342

Termination – Certification – Natural Justice – Related Employer – Sale of Business – Practice and Procedure – Reconsideration – Subsequent to the filing of a 69/1(4) application the UFCW and responding employers settled the matter in a way that affected employees in locations other than those which had received notice of the original applications – Neither the parties nor the Board ensured that these additional employees received notice of the Board's decision, reflecting the parties' settlement, which affected their rights – Given a timely objection by employees from one of the stores for which notice was not provided, the Board varied its decision to exclude the store from the bargaining unit descriptions contained in its earlier decision – Termination application dismissed – Certification continues

PHARMA PLUS DRUGMARTS LTD., KATZ GROUP CANADA LTD. AND PHARMX REXALL STORES LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 414 ....(May/June) 437

Termination – Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration –Timeliness – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 ....(Jan./Feb.) 20

Termination – Timeliness – Unfair Labour Practice – The responding union and intervening employer entered into a collective agreement, based on the terms of the Sudbury Heavy Civil Construction Collective Agreement ("Heavy Agreement"), commencing December 15, 2009 – The Heavy Agreement expired April 30, 2010 and the termination application was filed within 30 days of April 30th – The Board found that s. 58(1) mandates the minimum term of operation of a collective agreement to be one year, and since the exception in s. 58(4) did not apply (the intervening employer was not a member of the employers' organization), the application was untimely – The Board also rejected the employer's submission that the union should be estopped from relying on s. 58(1) for three reasons: first, estoppel cannot operate to prevent the operation of a public statute; second, the elements of estoppel were not made out; and third, there was no evidence of representations made to the applicant by the union, in any event – Application dismissed

LABELLE BROTHERS CONSTRUCTION AND/OR LABELLE BROTHER LTD., 763535 ONTARIO INC. O/A LABELLE BROTHERS EXCAVATING; RE DEREK SEQUIN; RE LIUNA, LOCAL 493 ....(May/June) 399

Timeliness – Abandonment – Certification – Construction Industry – Standing – Status – In its response to a certification application, the employer asserted that it was bound to a collective agreement with an employee association and therefore the application was untimely – The union challenged the status of the association, and argued that the employer had no standing to proffer arguments on behalf of the association which, the union alleged, had abandoned its bargaining rights by failing to file a response or intervention – The Board found that the employer, as signatory to the agreement, could make arguments asserting the existence of the association and the validity of the collective agreement – The employer was not purporting to advance interests of individual employees – Matter continues

ECONOMY PAVING COMPANY (ST. CATHARINES) LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ....(May/June) 390

Timeliness – Certification – Construction Industry – Because of a defective initial delivery (by fax) of one of two applications for certification, and the subsequent delivery of the application by courier, the employer asserted that the application was untimely – The Board (differently constituted) ruled on the delivery some three weeks after it was actually made – The present panel held that the employer was required to file its response and Schedule A within two days of the delivery of the application – The Board rejected the employer's position that the application for certification was not "valid" until the Board exercised its discretion to extend the time for delivery: once filed with the Board, the application was always valid – The employer's failure to provide a timely response prejudiced the applicant's ability to ascertain where employees were working on the application date – One certificate issued; second matter continues

JAY-DEE CONCRETE FORMING, VANSMIT LTD. O/A; RE LABOURERS' INTERNATONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL...(Jan./Feb.) 71

Timeliness – Certification – Construction Industry – Voluntary Recognition – Bruce Power and BACU were bound to a collective agreement that provided that if bricklayers' work was performed by Aecon or another subcontractor, the subcontractor was required to sign a document ("Appendix E") recognizing the bargaining rights of BACU – Aecon signed the document and delivered it to Bruce Power who failed to deliver it to BACU – BACU applied to certify bricklayers employed by Aecon – Aecon's position was that it was already bound to a collective agreement as a result of signing Appendix E, thus the application was untimely – The issue before the Board was whether a voluntary recognition had been created, and a collective agreement reached, between Aecon and BACU when Aecon executed the Appendix E document but BACU did not – The Board held that once Aecon executed Appendix E, the document became a voluntary recognition agreement between Aecon and BACU – The Board found that the signature of Aecon evidenced its acceptance of the terms of the voluntary recognition agreement offered by BACU – Accordingly the employees subject to the certification application were covered by a collective agreement on the application date – Application dismissed as untimely

AECON CONSTRUCTION GROUP INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA ....(May/June) 363

Timeliness – Certification – Reconsideration – In its response to the application for certification the employer indicated its disagreement with both the description of the bargaining unit and the union's estimate of individuals in it; and also checked "no" in response to the question whether it was giving an 8.1 notice – One day after the two day statutory time limit expired, the employer wrote the Board saying the "no" was inadvertent and it had provided the necessary information under 8.1 – The Board found the notice untimely; one week after the vote was taken and counted the employer applied for reconsideration – The Board rejected the employer's first argument that it had complied with the Act and given notice – The Board found the "no" coupled with the employer's failure to answer the supplementary question in addition to the statutory requirement indicated to it that notice was not given – The Board also rejected the alternative argument that it should exercise its discretion to extend the notice, when it found, assuming it had such discretion, that it would only grant relief in the most compelling circumstances, and there were none in these circumstances – Request for reconsideration denied

THE CORPORATION OF THE TOWN OF TECUMSEH; RE CUPE............(Sept./Oct.) 713

Timeliness – Certification – Reconsideration – The Board certified the trade union based on sufficient card-based membership, and stated in its decision that it had no regard to the employer's late-filed response – In its request for reconsideration, the employer deposed by affidavit that it had received misleading information regarding the time limit for its response from a Board clerk – The Board sets out the policy underlying its reluctance to permit parties to rely on oral evidence from Board staff to justify non-compliance with requirements established by the Act and the Rules (see *Sarnia Construction*) – In this case, the affidavit sworn by the employer's representative indicated he advised the Board clerk he had only received the applicant's information that day, which was the day relied upon by the Board staff – However, correspondence from the employer's counsel clearly showed that the responding party had received the application a day earlier and knew the date from which it was required to calculate the time for filing the response – Request for reconsideration dismissed

BUILD-ALL CONTRACTORS; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL..........(Jul./Aug.) 445

Timeliness – Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration – Termination – Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was "filed" with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625 ....(Jan./Feb.) 20

Timeliness – Termination – Unfair Labour Practice – The responding union and intervening employer entered into a collective agreement, based on the terms of the Sudbury Heavy Civil Construction Collective Agreement ("Heavy Agreement"), commencing December 15, 2009 – The Heavy Agreement expired April 30, 2010 and the termination application was filed within 30 days of April 30th – The Board found that s. 58(1) mandates the minimum term of operation of a collective agreement to be one year, and since the exception in s. 58(4) did not apply (the intervening employer was not a member of the employers' organization), the application was untimely – The Board also rejected the employer's submission that the union should be estopped from relying on s. 58(1) for three reasons: first, estoppel cannot operate to prevent the operation of a public statute; second, the elements of estoppel were not made out; and third, there was no evidence of representations made to the applicant by the union, in any event – Application dismissed

LABELLE BROTHERS CONSTRUCTION AND/OR LABELLE BROTHER LTD., 763535 ONTARIO INC. O/A LABELLE BROTHERS EXCAVATING; RE DEREK SEQUIN; RE LIUNA, LOCAL 493 ....(May/June) 399

Trade Union – Bargaining Rights – Construction Industry – Practice and Procedure – Termination – The Board confirmed that applicants seeking to terminate bargaining rights in the ICI sector may deliver their applications to either the employee bargaining agency or the local union with whom they have a relationship – The Board decided that the trade union named as the respondent has the obligation to give notice of the termination application to the Employee Bargaining Agency and the affiliated bargaining agents – Matter continues

KIDD MECHANICAL INC.; RE EMPLOYEES OF KIDD MECHANICAL INC. REPRESENTED BY VIKKI SCHLONIES; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ON ITS OWN BEHALF AND ON BEHALF OF ALL OF ITS AFFILIATED BARGAINING AGENTS.. (Mar./Apr.) 282

Trade Union – Bargaining Rights – Union Successor Rights – Unfair Labour Practice – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION......(Nov./Dec.) 871

Trade Union – Certification – Displacement – Natural Justice – Practice and Procedure – Representation Vote – In a displacement application for certification, Workers United Ontario Council (WUOC), the losing trade union in a close vote, raised an issue concerning the conduct of the representation vote – The vote consisted of two one-hour polls, one in the morning, the other in the evening – During the first fifteen minutes of the evening poll, the building doors were locked barring access to potential voters – Inquiries made by WUOC did not indicate that any individual was prevented from voting due to lack of access – WUOC requested another vote which UNITE HERE opposed – The Board followed the principle that "when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election" – The Board found that voters are entitled to a high standard of integrity, but not perfection in the conduct of representation votes – The Board concluded that there was no evidence the error prevented anyone from voting, and declined to disregard the outcome of the balloting – Matter continues

NORDIC GAMING CORPORATION; RE WORKERS UNITED ONTARIO COUNCIL; RE UNITE HERE ....(Jul./Aug.) 495

Trade Union – Evidence – Natural Justice – Practice and Procedure – UNITE HERE brought a motion to admit the transcripts taken by a court reporter during eleven hearing days presided over by the Chair, who was appointed a Judge of the Superior Court of Justice of Ontario, and as a result was unable to continue to hear and determine these proceedings – UNITE HERE had been granted permission to have a court reporter create transcripts of the evidence with the usual understanding that the transcripts must be shared with the other parties and the Board and were not an official record – At a reconstituted hearing before a different Vice-Chair, the use of these transcripts for the purpose of expediting the proceedings was explored – Workers United Ontario Council (WUOC) indicated that it was not prepared to consent to the use of the transcript, predominately because such a process did not accord with the principles of natural justice given the dangers surrounding the admittance of hearsay evidence – The Board found that a reading of sections 111(2)(e) of the Act and s. 15(1) of the *Statutory Powers Procedure Act* clearly indicated that the authority to admit hearsay evidence such as the transcripts is within its power – On analysis as to whether the transcripts ought to be admitted, the Board indicated that the relevancy, reliability, unfairness and any violations of natural justice should provide the basis upon which it should determine whether to accept or reject hearsay evidence – Ultimately, the Board found that the provision of an opportunity for WUOC to cross-examine witnesses on their adoption of the prior statements under the observation of the Vice-Chair effectively ensured that there was no unfairness or violation of natural justice arising from the dangers associated with admitting hearsay evidence – Accordingly, the transcripts were admitted as evidence – Matter continues

UNITE HERE; RE WORKERS UNITED ONTARIO COUNCIL AND ARAMARK CANADA LTD...(Jul./Aug.) 568

Trade Union – Health and Safety – *Trades Qualification and Apprenticeship Act* – PCL filed an application under the OHSA to appeal orders against them – The Labourers, Local 247 intervened in support of PCL; the Sheet Metal Workers and the UA, Local 221 intervened in support of the inspector and his orders – Part of major redevelopment work by Kingston General Hospital (KGH) involved the removal and replacement of selected portions of existing HVAC systems by subcontracted Envirocon employees – An Inspector visited the areas at the KGH where Envirocon's construction labourers were performing work on the HVAC system – The site visit resulted in the Inspector issuing four orders, which all turned on the main issue in dispute: whether or not the "handling and dismantling of sheet metal" work performed by the Labourers was in fact sheet metal work as defined under Regulation 1077 of the TQAA and, therefore, within the meaning of OHSA Regulation 572/99 – Regulation 572/99 of the OHSA is designed to promote health and safety by ensuring workers have the proper and appropriate training achieved by directly incorporating regulations passed under the TQAA – The Board found that the work in question did not call for the specialised and exclusive training which sheet metal workers receive, and was therefore not the "handling and dismantling of sheet metal" within the meaning of Regulation 1077 – Accordingly, the provisions of 572/99 did not require that such work be performed exclusively by sheet metal workers – Inspector's Orders set aside

PCL CONSTRUCTORS CANADA INC.; LIUNA, LOCAL 247, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 269; ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE, AND KEVIN KEALEY, INSPECTOR..........(Jul./Aug.) 510

Trade Union – *Hospital Labour Disputes Arbitration Act* – Reference – The question referred to the Board on a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (HLDAA) was whether or not bargaining unit employees are covered by HLDAA – CUPE took the position that HLDAA applied while Rothwell opposed this view – The advice provided by the Board was that the bargaining unit employees of this employer are not covered by HLDAA – Rothwell is not an enumerated institution under the definition of "hospital" in HLDAA because its employees primarily provide cleaning, and not personal care services – The Board found that the health, safety or well-being of the residents would not be jeopardized by a strike and that Rothwell was not an institution operated for the "care, observation or treatment" of those clients within the meaning of section 3(2) of HLDAA – Advice provided

ROTHWELL HEIGHTS LODGE; CUPE AND ITS LOCAL 3317..........(Jul./Aug.) 533

Trades Qualification and Apprenticeship Act – Construction Industry – Health and Safety – Jurisdictional Dispute – The UA called the Health and Safety Inspector to seek a ruling to determine whether or not the work performed by Carpenters could only be done by a person who was licensed as a journeyman or apprentice plumber – The Inspector's Order required the work to be performed by plumbers – The Carpenters seek to have the Board suspend the Order pending the appeal – The Board applied its standard three part test to determine whether a suspension of the Order was appropriate – The first and third element of the test converge as the Regulations of the TQAA specify what training is required for specific trades, and the Board will likely find it unsafe for any person without such training to perform the work – The issue was simplified to an application of the work to the TQAA and Carpenters' and Plumbers' Regulations suggesting that the dispute was entirely a jurisdictional one and not a question of worker safety – Therefore a strong case for a successful appeal existed – Worker safety will not be affected by suspending the Order – There was prejudice to the employer if the Order was not suspended as the UA was seeking to disrupt the commercial arrangements between the employer and contractor – Order suspended until the appeal is determined

ACTION GROUP INC., AND DAN DIGNARD, INSPECTOR; RE UBCJA, LOCAL 1946; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 593 .... (Mar./Apr.) 223

Trades Qualification and Apprenticeship Act – Health and Safety – Trade Union – PCL filed an application under the OHSA to appeal orders against them – The Labourers, Local 247 intervened in support of PCL; the Sheet Metal Workers and the UA, Local 221 intervened in support of the inspector and his orders – Part of major redevelopment work by Kingston General Hospital (KGH) involved the removal and replacement of selected portions of existing HVAC systems by subcontracted Envirocon employees – An Inspector visited the areas at the KGH where Envirocon's construction labourers were performing work on the HVAC system – The site visit resulted in the Inspector issuing four orders, which all turned on the main issue in dispute: whether or not the "handling and dismantling of sheet metal" work performed by the Labourers was in fact sheet metal work as defined under Regulation 1077 of the TQAA and, therefore, within the meaning of OHSA Regulation 572/99 – Regulation 572/99 of the OHSA is designed to promote health and safety by ensuring workers have the proper and appropriate training achieved by directly incorporating regulations passed under the TQAA – The Board found that the work in question did not call for the specialised and exclusive training which sheet metal workers receive, and was therefore not the "handling and dismantling of sheet metal" within the meaning of Regulation 1077 – Accordingly, the provisions of 572/99 did not require that such work be performed exclusively by sheet metal workers – Inspector's Orders set aside

PCL CONSTRUCTORS CANADA INC.; LIUNA, LOCAL 247, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 269; ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE, AND KEVIN KEALEY, INSPECTOR...(Jul./Aug.) 510

Unfair Labour Practice – Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Remedies – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application, Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found

that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 1

Unfair Labour Practice – Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Practice and Procedure – A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to "important social considerations" – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD ....(Jan./Feb.) 92

Unfair Labour Practice – Bargaining Rights – Trade Union – Union Successor Rights – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two

Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION......(Nov./Dec.) 871

Unfair Labour Practice – Certification – Construction Industry – Employer – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891..(Nov./Dec.) 760

Unfair Labour Practice – Certification – Discharge – Interim Relief – The union applied for interim reinstatement of the worker contending he was terminated for his involvement in the organizing drive – The evidence showed that prior to his termination the union had signed up five members (in a 65 member bargaining unit) and after his termination the union signed up an additional 37 members and filed for certification – As the worker's termination did not stall the organizing drive (indeed it seemed to propel it), the Board found that interim relief was not necessary to prevent irreparable harm nor was it necessary to achieve other significant labour relations objectives – Accordingly all of the conditions under s. 98(2) were not met – Application dismissed

NOVOTEL CANADA INC., ACCOR CANADA INC., NOVOTEL OTTAWA; RE HOSPITALITY & SERVICE TRADE UNION, LOCAL 261 AND JEFFREY SEGAT .... (Mar./Apr.) 287

Unfair Labour Practice – Certification – Employer Support – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 .... (Nov./Dec.) 850

Unfair Labour Practice – Certification – Employer Support – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 .... (Nov./Dec.) 850

Unfair Labour Practice – Certification Where Act Contravened – Discharge for Union Activity – During the course of CEP's organizing campaign, Boehmer and some of its employees distributed written communications which the union alleged were false and misleading and which implied that unionization would undermine the viability of the enterprise and would therefore compromise employees' job security – CEP lost the representation vote by a large margin, despite obtaining the support of a majority of the employees as of the application date – The Union alleged that literature distributed by, or with the approval of, Boehmer threatened the livelihood of employees and had a chilling effect on the voters – The issue before the Board was whether Boehmer violated the Act and if so, whether CEP was entitled to remedial certification despite having lost the representation vote – A majority of the Board found that a number of events at the workplace did not constitute unfair labour practices; however, the written communications and the links made in those communications between unionization and job security did constitute a violation of the Act – The majority found that neither a second representation vote alone nor the Board's other customary remedies in combination with a second vote would adequately respond to the threats raised by Boehmer's written communications – The union was entitled to remedial certification – Certificate issued

BOEHMER BOX LP; RE CEP .... (Mar./Apr.) 237

Unfair Labour Practice – Construction Industry – Duty to Bargain in Good Faith – Employer – In negotiating the renewal of the collective agreement, the employer tabled a proposal with respect to jurisdiction and contracting out provisions – These amendments pertained to only one of the members of the Skilled Trades Council, the IBEW, which claimed the employer's proposals were an attempt to bargain recognition provisions to impasse, in breach of the obligation to bargain in good faith –The Board noted that to determine if changes are truly inconsistent with the Act, the context of the particular collective agreement and circumstances must be reviewed – The Board found the proposal to change the jurisdiction clause did not change the description of the bargaining unit and the change to the contracting out wording did not breach the Act, as it was the same language that the other members of the council have lived with, nor does it threaten the long-term integrity of the bargaining unit or IBEW's bargaining rights in light of the provincial collective agreement which covers electrical work in the ICI sector – The Board determined that the employer's proposed amendments did not breach their obligation to bargain in good faith

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE ESSEX AND KENT COUNTIES SKILLED TRADES COUNCIL .... (Mar./Apr.) 275

Unfair Labour Practice – Construction Industry – Interim Relief – During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C., AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD ....(Jan./Feb.) 85

Unfair Labour Practice – Construction Industry – Interim Relief – Intervenor – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC..(Jan./Feb.) 173

Unfair Labour Practice – Discharge – Duty to Bargain in Good Faith – *Prima facie* motion – Strike – The parties settled a strike leaving one outstanding issue: whether Vale's refusal to agree to an arbitration process that could result in the reinstatement of striking employees discharged during the strike violated s. 17 of the Act – The Board noted that USW's interpretation of *Royal Oak* would mean that it would be a breach of the duty to bargain for a party to maintain an objectively unreasonable position to impasse, regardless of the party's motivation for doing so, and that this position would effectively render "illegal *per se*" that which neither any specific provision nor the scheme of the Act as a whole makes illegal – The Board concluded that the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike was not sufficient in and of itself to give rise to a breach of the duty to bargain – Next, concerning Vale's position that USW had not pled a *prima facie* case, the Board held that the USW had pled that Vale maintained to impasse a position of refusing to agree to just cause arbitration and that this was unusual and *Royal Oak* provides a basis for arguing that it is objectively unreasonable – Accordingly, the Board dismissed the prima facie motion, finding that a reasonable argument could be made on the basis of USW's pleadings which would result in the conclusion that Vale breached its duty to bargain – Finally, the Board found that Vale was entitled to lead the evidence with respect to the reasons it maintained its position – Matter continues

VALE INCO LIMITED; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 6500 AND ITS LOCAL 6200..................(Jul./Aug.) 548

Unfair Labour Practice – Discharge for Union Activity – Interim Relief – The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union – The four criteria under s. 98(2) having been met, the Board ordered interim reinstatement – Interim Relief granted

SOBEYS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A .... (Nov./Dec.) 825

Unfair Labour Practice – Duty of Fair Representation – Practice and Procedure – After finding that the complainant had not made out a prima facie case, and reviewing eight previous duty of fair representation complaints, the Board found the complainant to be a vexatious litigant on the basis of the following material: he brought multiple proceedings making basically the same allegations; he consistently sought relief the Board would not conceivably grant; he made unjustifiable and unreasonable aspersions against the lawyers representing the Union and its officials and representative, and against the adjudicators and officers of the Board; for the Board to address the series of exaggerated and unsupported allegations was an abuse of public resources and an abuse of process – The applicant was declared a vexatious litigant and not permitted to file a complaint against the union or employer without leave of the Board – Application dismissed

DR. PETER A. KHAITER; RE YORK UNIVERSITY FACULTY ASSOCIATION (YUFA) .... (Sept./Oct.) 622

Unfair Labour Practice – Duty to Bargain in Good Faith – During bargaining for a renewal collective agreement, OPSEU sought the names and telephone numbers of all its members from the employer – The employer resisted, relying on a provision in the parties' collective agreement that limited disclosure of employees' contact information to once per year, and exempted those employees who objected to having their contact information given to the union – OPSEU alleged the employer was bargaining in bad faith and interfering with the union's statutory right to represent its members; it was not specifically relying on the alleged breach of the collective agreement – The Board found the employer has a positive obligation to provide the information to the union to facilitate equal bargaining positions in the collective bargaining relationship – The union's request for the information was made in the context of giving notice to bargain a new collective agreement – The employer's refusal to furnish the information was an interference with the union's administration of its bargaining rights – Application allowed

OAKLANDS REGIONAL CENTRE; RE OPSEU .... (Sept./Oct.) 658

Unfair Labour Practice – *Freedom of Information and Protection of Privacy Act* – The union sought disclosure of a document ("Notice of Decision") detailing the results of the employer's investigation of complaints made between two union members pursuant to the employer's policy regarding harassment complaints – The issue before the Board was whether or not the mandatory limitation on the disclosure of personal information under the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") prevented the Board from issuing an order requiring the employer to disclose the Notice of Decision to the union – The Board found that *FIPPA* did not prevent disclosure of the Notice of Decision as it fell within the labour relations exception under section 65(6) and accordingly *FIPPA* had no application – In addition, after reviewing *FIPPA* section 21(1) the Board found that to the extent that disclosure of the Notice of Decision to the union involved any invasion of personal privacy, it was not an unjustified invasion – Matter continues

LAURENTIAN UNIVERSITY; RE LAURENTIAN UNIVERSITY FACULTY ASSOCIATION..(May/June) 405

Unfair Labour Practice – Interim Relief – The employer laid off a number of employees during a CAW organizing campaign – The CAW filed an unfair labour practice complaint and an interim relief application alleging that the lay-offs were motivated by anti-union animus, animated particularly by the inclusion of three employees who were supporters of the union – The employer reinstated the employees and the CAW withdrew its application for interim reinstatement – The CAW then filed an application for certification but withdrew the application two days later – There were then additional lay-offs including the three employees who were supporters of the union – The CAW filed an application to have the employees reinstated to their positions – In assessing whether a campaign to establish bargaining rights was underway the Board found that there was sufficient evidence to conclude that the organizing drive continued after the CAW withdrew its application – The fact that the CAW withdrew its application for certification did not mean that its campaign to establish bargaining rights was no longer underway – In assessing whether all of the conditions under s. 98(2) were met the Board held that on a balance of probabilities it narrowly appeared that the lay-offs were unrelated to the exercise of rights under the Act – There was evidence that the employees had been selected for possible lay-off prior to the CAW organizing campaign – Application for interim relief dismissed

MJ MANUFACTURING – A DIVISION OF MARTINREA INTERNATIONAL INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)................(May/June) 419

Unfair Labour Practice – Standing – Milk and Bread Drivers Local 647 and Bakery, Confectionary Local 264 each had collective agreements with Canada Bread at different locations – Local 647 claimed that a collective agreement entered into between Canada Bread and Local 264 was void because it was spawned following the early termination of an existing agreement, and notice of the early termination had not been properly posted – Local 647 argued that the employer had effectively "chosen" 264 over 647 to be the bargaining agent of a new facility it was planning to open – The applicant also argued that the new agreement gave Local 264 bargaining rights beyond the geographic scope of any rights it actually held – Finally, Local 647 submitted that its own collective agreement with one of Canada Bread's facilities provided that its employees would be offered jobs at the new facility – The Board held that Local 647 had no standing to challenge the early termination: Local 647 was not affected in any way by it and only an employee in Local 264's bargaining unit could claim the improper posting – There were several possible consequences of the new collective agreement between Local 264 that could affect the employees represented by Local 647, but since the new facility had not opened and there were no employees currently working there, those consequences were speculative – The applicant had no standing to bring these challenges – Application dismissed

CANADA BREAD COMPANY, LIMITED AND BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION AFL-CIO, CLC, LOCAL 264; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION 647.................. (Sept./Oct.) 616

Unfair Labour Practice – Termination – Timeliness – The responding union and intervening employer entered into a collective agreement, based on the terms of the Sudbury Heavy Civil Construction Collective Agreement ("Heavy Agreement"), commencing December 15, 2009 – The Heavy Agreement expired April 30, 2010 and the termination application was filed within 30 days of April 30th – The Board found that s. 58(1) mandates the minimum term of operation of a collective agreement to be one year, and since the exception in s. 58(4) did not apply (the intervening employer was not a member of the employers' organization), the application was untimely – The Board also rejected the employer's submission that the union should be estopped from relying on s. 58(1) for three reasons: first, estoppel cannot operate to prevent the operation of a public statute; second, the elements of estoppel were not made out; and third, there was no evidence of representations made to the applicant by the union, in any event – Application dismissed

LABELLE BROTHERS CONSTRUCTION AND/OR LABELLE BROTHER LTD., 763535 ONTARIO INC. O/A LABELLE BROTHERS EXCAVATING; RE DEREK SEQUIN; RE LIUNA, LOCAL 493...(May/June) 399

Unfair Labour Practice Certification – Where Act Contravened – Construction Industry – Interference with Trade Unions – Remedies – The Carpenters commenced an organizing campaign by having an employee of Southend distribute cards – The owner's brother, who was the employee's supervisor, openly expressed his dislike of unions, and burned another employee's union card at the workplace, in front of several other employees – The employer argued that the discharge of the employee who began distributing cards was for excessive absences, and for drinking during lunch – The Board found that the termination of the employee effectively put an end to the organizing campaign – The Board preferred the discharged employee's evidence over that of the employer's witnesses – Although his attendance may have been at issue, it was not the reason for the discharge – Other employees were reprimanded for drinking at lunch; the inside organizer was terminated – The employer did nothing to distance himself from his brother's anti-union behaviour – The Board was satisfied that a representation vote would not reflect the true wishes of employees – Certificate granted

SOUTHEND DRYWALL & ACOUSTICS LTD.; RE UBCJA, LOCAL 2486... (Mar./Apr.) 317

Union Successor Rights – Bargaining Rights – Trade Union – Unfair Labour Practice – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION......(Nov./Dec.) 871

Union Successor Rights – Sale of a Business – BFI purchased York Disposal, and merged operations, intermingling employees and overlapping the scope clauses of the two bargaining units of the same union – The employer applied under s.69(6) to terminate the York bargaining rights so its existing collective agreement with BFI could apply to all employees – The union challenged the application, arguing that s.69 operates to preserve and protect bargaining rights and the expiry of the York collective agreement precluded any order under s.69(6)(a-d); further, the application of s.69(6) is restricted to different, competing bargaining agents – The Board rejected both arguments, holding that s.69(6) applied even though the same union represented both groups of employees – The Board held that s.69 must be read in its entirety: while an order under s.69(6)(a) may not be available, the Board retained the authority to grant a remedy pursuant to s.69(6)(b)-(d) – Further, the Board noted that while the intent of s.69 is to preserve and protect bargaining rights, s.69(6) operates despite these protective provisions in order to resolve the labour relations issues caused by intermingling following a sale – The Board exercised its discretion to grant the order sought

BFI CANADA INC; RE TEAMSTERS LOCAL UNION NO. 419 .... (Sept./Oct.) 594

Voluntary Recognition – Certification – Construction Industry – Timeliness – Bruce Power and BACU were bound to a collective agreement that provided that if bricklayers' work was performed by Aecon or another subcontractor, the subcontractor was required to sign a document ("Appendix E") recognizing the bargaining rights of BACU – Aecon signed the document and delivered it to Bruce Power who failed to deliver it to BACU – BACU applied to certify bricklayers employed by Aecon – Aecon's position was that it was already bound to a collective agreement as a result of signing Appendix E, thus the application was untimely – The issue before the Board was whether a voluntary recognition had been created, and a collective agreement reached, between Aecon and BACU when Aecon executed the Appendix E document but BACU did not – The Board held that once Aecon executed Appendix E, the document became a voluntary recognition agreement between Aecon and BACU – The Board found that the signature of Aecon evidenced its acceptance of the terms of the voluntary recognition agreement offered by BACU – Accordingly the employees subject to the certification application were covered by a collective agreement on the application date – Application dismissed as untimely

AECON CONSTRUCTION GROUP INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA ....(May/June) 363

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